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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 914

THE NEW YORK CENTRAL RAILROAD COMPANY; ERIE-LACKAWANNA RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE LONG ISLAND RAIL ROAD COMPANY; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor; LEHIGH VALLEY RAILROAD COMPANY; BOSTON AND MAINE RAILROAD; THE DELAWARE AND HUDSON RAILROAD CORPORATION; THE BALTIMORE & OHIO RAILROAD COMPANY; and THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Appellants,

—against—

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York; and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; and LEONARD RUBENFELD, as District Attorney of Westchester County,

Respondents,

—and—

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN,

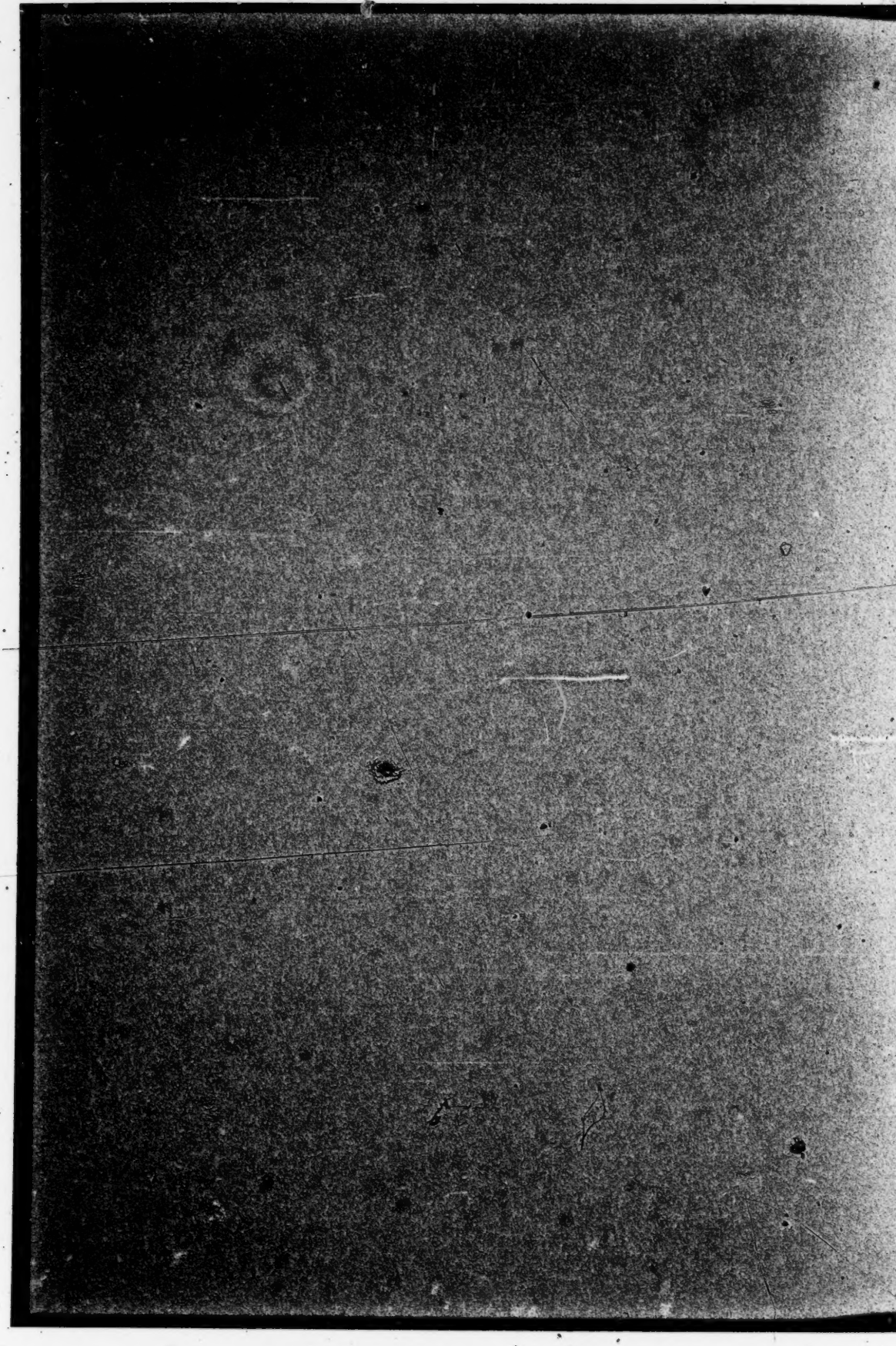
Intervenors-Respondents.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

JOHN A. WELLS
CAESAR L. PITASSY
DAVID F. DOBBINS
IAN R. GILBERT
200 Park Avenue
New York, New York 10017

Of Counsel:
GERALD E. DWYER
New York, New York
VICTOR F. CONDELLO
New York, New York
ROYALL, KOEGEL, ROGERS & WELLS
New York, New York



INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
THE CHALLENGED STATUTE	4
QUESTION PRESENTED	4
STATEMENT OF THE CASE	5
A. The Proceedings and the Presentation of the Federal Question	5
B. The Facts	6
THE QUESTION IS SUBSTANTIAL	14
Section 54-b of the New York Railroad Law is Unconstitutional Special Class Legislation	14
CONCLUSION	22

CASES CITED

PAGE

Atchison, Topeka & Santa Fe Ry. Co. v. *State,* 33 Ariz. 440, 265 Pac. 602 (1928) 18

BLF&E v. *Chicago, R. I. & P. R. Co.,* U. S. , 89 S. Ct. 323, 37 U. S. L. W. 4032 (November 18, 1968) 3, 21

Bangor & Aroostook R. R. Co. v. *BLF&E,* 255 F. Supp. 476 (D. D. C. 1966) 12

Chippewa Indians v *United States,* 301 U. S. 358 ... 19

Missouri-Kansas-Texas Railroad Co. v. *State,* 131 S. W. 2d 702 (Tex. Civ. App. 1939), *writ of error refused* (Tex. Sup. Ct. 1939) 18

New York Public Service Commission Case No. 24598 (1968) 19

Northern Pacific Ry. Co. v. *Warren,* 77 N. D. 721, 45 N. W. 2d 196 (1950) 17

Smith v. *Texas,* 233 U. S. 630 .....3, 15

Smith v. *Texas,* 66 Tex. Crim. 383, 146 S. W. 900 (1912) 15

United States v. *C. I. O.,* 335 U. S. 106 19

United States v. *Harriss,* 347 U. S. 612 19

Washington ex rel Seattle Trust Co. v. *Roberge,* 278 U. S. 116 17

AUTHORITY

Report of Emergency Board No. 68 (1949) 14

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the trial court dismissing the action on the merits on April 8, 1965, 46 Misc. 2d 68, 259 N. Y. S. 2d 76 (Sup. Ct. Westchester Co. 1965), is printed in the Appendix to this Statement at A-1.* The trial court's judg-

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*Page references to the appendix included with this statement begin with the letter "A". Page references to the printed Record are followed by the letter "a", e.g., 5479a.

ment was affirmed without opinion by the intermediate appellate court, the Appellate Division, Second Department, on June 29, 1967, 28 A. D. 2d 735, 282 N. Y. S. 2d 68 (2d Dep't 1967). The memorandum decision of the Appellate Division is printed in the Appendix at A-56. The Court of Appeals, with one judge disqualifying himself, originally was evenly divided, and, accordingly, ordered reargument and designated a judge of the Appellate Division to participate in the appeal (A-77). Upon reargument, it affirmed the holding of the court below by a 4 to 3 decision, 23 N. Y. 2d 1, 241 N. E. 2d 730 (1968). The Court of Appeals opinion is printed in the Appendix at A-58.

JURISDICTION

This action was brought pursuant to Section 473 of the New York Civil Practice Act, seeking a judgment declaring Sections 54-a, 54-b and 54-c of the Railroad Law of the State of New York unconstitutional and enjoining their enforcement. These laws required minimum crews of five or six men in freight train and yard operations.

The action was originally brought by the ten plaintiffs, the ten major railroads ("Railroads") operating in New York, against the Attorney General of the State of New York, the Public Service Commission of the State of New York and the District Attorney of Westchester County.

The Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen ("BLF&E"), the Brotherhood of Railroad Trainmen and the Order of Railway Conductors and Brakemen, unions whose members filled the various positions required by these laws, intervened as parties defendant. During the trial, the Brotherhood of Locomotive Engineers, which represents most of the engi-

neers employed by the Railroads, and the Brotherhood of Railroad Trainmen, which represents most of the trainmen, withdrew from this action.

In June, 1966, Sections 54-a and 54-c were repealed. Laws of the State of New York, 1966, Chapters 693 and 694. These two sections set the minimum number of *trainmen* or *helpers* for yard and freight train crews. Section 54-b, which was not repealed, requires a *fireman* or *helper* on all diesel locomotives, and is the most important section in terms of cost to the Railroads and numbers of men required to be employed (555a; 2798a-2802a).

The opinion and order of the Court of Appeals are dated October 10, 1968; the judgment entered thereon by the Supreme Court of the State of New York for the County of Westchester is dated October 28, 1968 (5050a). The notice of appeal was filed with the Clerk of the Supreme Court of the State of New York for the County of Westchester on December 24, 1968 (5052a). The appeal is taken from the opinion and order of the Court of Appeals.

The statutory provision believed to confer jurisdiction of the appeal upon this Court is 28 U. S. C. § 1257(2). The cases believed to sustain the jurisdiction of this Court are *Smith* v. *Texas,* 233 U. S. 630, and *BLF&E* v. *Chicago, R. I. & P. R. Co.,* U. S. , 89 S. Ct. 323, 37 U. S. L. W. 4032 (November 19, 1968), to the extent that it and prior Arkansas full crew cases establish that this Court has exercised its appellate jurisdiction to review the constitutionality of state statutes regulating manning requirements on railroads.

THE CHALLENGED STATUTE

Section 54-b of the Railroad Law was enacted in 1936 and reads as follows:

> "No person, corporation, trustee, receiver or other court officer shall run or operate, or cause to be run or operated, on any railroad within this state any fuel-electric engine, unless said engine shall be manned with a crew of not less than one engineer and one fireman or helper. Each separate violation of the provisions of this section shall be a misdemeanor punishable by a fine of not less than one hundred dollars nor more than five hundred dollars. Each day that any such engine shall run in violation of the provisions of this section shall be deemed to be a separate offense. The public service commission shall enforce the provisions of this section."

QUESTION PRESENTED

WHETHER SECTION 54-b OF THE NEW YORK RAILROAD LAW AS INTERPRETED BY THE NEW YORK COURT OF APPEALS IS UNCONSTITUTIONAL CLASS LEGISLATION.

STATEMENT OF THE CASE

A. The Proceedings and the Presentation of the Federal Question.

The specific federal question presented on this appeal is whether a state can under the guise of exercising its police power constitutionally require a fireman as the second man on diesel locomotives to the exclusion of brakemen in the face of the indisputable fact that brakemen are as qualified as firemen to act as helpers on such locomotives. This issue was raised and passed upon in all of the lower courts. The New York Court of Appeals stated this issue in the following terms (A-61):

> In order to come to grips with the suggestion of plaintiffs that the statute is unconstitutional it is necessary preliminarily to decide two things: (a) whether section 54-b must be read as requiring the assignment of an additional engine crewman to help the engineer, and that this is not sufficiently met by the assignment of a front-end brakeman from the train crew; (b) if the statute is construed to require the helper to be a member of an engine crew, whether the requirement is rationally based in the promotion of safety. The opinion of the Special Term [the trial court] must be read as finding affirmatively on both aspects; and, if this is right, the statute is unexceptionable on constitutional grounds.

It resolved this issue in precisely the same way as the trial court did and, quoting from the trial court, stated (A-70):

> "The conclusion from all this was: 'Although there is room for argument, and the question may be fairly debatable, I do not find that it is unreason-

able to require, as the full crew statutes do, that a second man be present in the locomotive cab, or that the second man shall have, in addition to ability to act as lookout and read and pass signals, the training and qualifications *ordinarily* possessed by firemen, which *may* make it possible for him to be of assistance to the engineer in the operation of the locomotive". (Emphasis supplied)

B. The Facts

While so-called full crew laws have been before this Court many times, this case presents for the first time the question of whether a state can in the exercise of its police power constitutionally require a fireman to the exclusion of all other operating personnel as a "helper" to an engineer on a diesel locomotive. The New York Court of Appeals held that it could.

The proven, indisputable fact—not challenged by the New York Court of Appeals—is that firemen are sent out on the road with no more training or experience than brakemen (325a-26a; 1132a; 2941a). When such duties must be performed, the head brakeman calls signals, resets ground relays and operates the emergency brake valve on the left side of the locomotive (2102a; 2943a; 2947a; 3058a). Yet the Court of Appeals held that a brakeman cannot serve as a "helper" to the engineer. In effect, it excised the term "helper" from Section 54-b and held that the requirement in that section of a "fireman *or* helper" could only be satisfied by using a fireman.

This case does not concern itself with the issues posed by the full crew cases—whether it is constitutional to require a certain minimum number of men in a railroad crew. The Railroads do not now and never have claimed they intend to operate any diesel powered train, freight or

passenger, without two men in the cab of the locomotive. It is the invariable practice and rule on the Railroads that the head brakeman ride in the cab of the locomotive on freight trains (32a; 509a; 4624a; 4629a; 4758a; 4785a). As the New York Court of Appeals stated, "they [the Railroads] concede that in passenger trains where the front-end brakeman does not ride in the engine cab, there must be a helper specially assigned for the engineer and that in this effect on passenger train operation the statute is valid" (A-60).

Both the majority and dissenting opinions of the Court of Appeals were in agreement on the issue before that court and now posed to this Court. The dissenting opinion stated the issue as follows (A-74):

> "The evidence amply supports, and the railroads do not contend otherwise, that the presence of an assistant to the engineer however termed or titled, in the engine cab is justified at all times, except when occasions require that he fulfill his functions as assistant by signaling from the ground, as in yard service. That is not the issue in the case. The issue is whether safety requires that such an assistant be assigned to the engine crew, separate from the train crew. The argument that brakemen on the train crew do not or will not have the training or skills required to assist the engineer is blasted by the practice of the railroads in those States that permit it, and in neighboring Canada, to have some train crew brakemen so trained, and indeed, to be in the line of promotion to diesel engineers. Hence it is a false issue to argue that the engineer's assistant must have special training."

The undisputed fact of record is that firemen are no more assistant engineers than brakemen are. They are sent out on the road with no more training or experience than brakemen (325a-26a; 1132a; 2941a). In countless instances neither the firemen nor the brakeman is qualified to operate the engine (316a; 608a-09a; 1774; 2944a).

To sustain the constitutionality of excising the term "helper" from Section 54-b, the firemen's union argued in the lower courts that firemen were required to be able to operate the locomotive, and eventually to become fully qualified engineers. The record reveals that these arguments have no basis in fact.

On the New York Central (now Penn Central), which has the largest railroad operation in New York (4581a-89a), a man hired as a fireman goes out on the road after three rides as a student. This was explained by one of the railroad officials as follows (1132a):

> "What I am trying to say is that when we hire a fireman on the railroad we hire him as a fireman. All he has to do to hire out as a fireman is work three periods of 8 hours each with some individual. After that he is a fireman and he works as a fireman."

The training he receives prior to serving as a fireman is exactly the same as any other man hired for operations (a brakeman, train dispatcher or signal man) receives. Again, a railroad witness explained this (313a-16a):

> "Q. And now, General Rule C. provides:
>
> 'Employees must pass the required examinations.'
>
> Is that correct? A. Yes.
> Q. And is that still the rule? A. Yes.

Q. I show you a document which purports to be examination on rules of the operating department for train dispatchers, conductors, trainmen, engine men, firemen, operators, signal men and others who may be designated, and I will ask you whether——

The Court: Others who may be what, Mr. Shaw?

Mr. Shaw: Who may be designated.

Q. And I will ask you whether that is an examination book prepared by the operating department as an examination to be administered to the designated employees?

A. Yes."

"Q. Whether you have seen that particular piece of paper before, does this outline the procedure for taking these examinations as it is done on the New York Central?

A. In general, yes."

* * * *

"Q. Mr. Kenefick, General Rule Exhibit B provides:

'Employees must be conversant with and obey the rules and special instructions.'

This is an examination to determine whether they are conversant with the operating rules that we have been through, is that correct?

A. Yes.

Q. With respect to firemen what is the procedure for the training of a fireman, to your knowledge, from the beginning?

A. You mean if we were to hire a new fireman today?

Q. I mean if you were to hire a new fireman [373] today or in the recent past, what is the current procedure?

A. Well, after—I believe we discussed this morning physical examination, and he is given the rule book and so on.

The procedure varies somewhat from division to division, but the general rule is that a *fireman or any other similar employee* would be given some instruction by one of our safety supervisors—some instruction in the rules and shown the proper way to get on and off an engine so that he would not hurt himself; the proper way to display a fusee; the proper way to give and interpret hand signals.

Q. He would be instructed in the rule book, would he not?

A. Yes. And then he would make a certain number of so-called trips riding on an engine as an observer." (Emphasis added)

This procedure is the same as that used by the Canadian National Railway, which also operates within this state (A-83):

"Mr. Wilson testified that he is the local chairman for the Niagara Falls Lodge of the Brotherhood [BLF&E] and that he has been qualified as an engineer since 1953. He described the hiring procedure for firemen as consisting of a physical examination after which instruction in the rules is received, followed by three trial trips on the locomotive. Thereafter, following training in mechanical work and the writing of "year books," he qualifies as an engineer in yard and freight service. On cross-examination the witness said that the yard man [brakeman] also takes a physical examination and receives instructions on the same book of rules as

the fireman. The yard man takes three trial trips on which he receives instructions about the switches and the handling of cars.'"

Another argument with no basis in fact, yet consistently advanced by the BLF&E in the courts below for excising the term "helper" from Section 54-b, is that firemen are uniformly required to pass examinations for promotion to enginemen and that they are dismissed for failure to do so. Again records show the contrary. The rule on the Delaware & Hudson was explained by its general manager as follows (1774a):

"Q. You say that because he is given a second [2637] crack at them?

A. I can explain, Mr. Brook. He is given three trials at the first series, and if he misses the first trial he then drops on the roster below the men who have passed the examination. And then when we are ready to qualify more enginemen he has an opportunity for another trial and the same procedure is followed there. If he fails again he is given another chance later on, his third trial, and if he misses he is dropped on the roster, but he is not dismissed from the service.

The Court: What happens after that, Mr. Miller, as far as he is concerned?

The Witness: He stays as a fireman.

The Court. In road service?

The Witness: In any service."

The rule on the state's largest carrier, the New York Central, is similar (609a).

"Q. But he does not remain as a fireman in road service or yard service if he fails the third examination? He is relegated, as you say, to being a hostler in the round-house?

A. I didn't say that. He is a hostler in the round-house or he can be restricted to being a yard fireman."

Neither the BLF&E nor anyone else has ever claimed that the refusal of some Railroads to require their firemen to qualify as engineers constituted a violation of Section 54-b. Acquiescence in this refusal underscores the point that there is nothing in Section 54-b requiring the "fireman or helper" to qualify as an engineer and nothing in the statute preventing the Railroads from training other men as engineers.

Since the Railroads were by law and, until recently, by collective bargaining agreements, required to employ a member of the BLF&E, a so-called fireman-helper, training him as an engineer seemed to be the only way to salvage some value out of an inherently wasteful expenditure. The practice of training firemen to become engineers in large part stems from the demands of the BLF&E. These demands are part of the effort of the BLF&E to find some justification for the continued retention of the fireman. The BLF&E is responsible for the rules and regulations for firemen and it presses training programs for firemen with vigor (2933a). The refusal of some railroads to allow the BLF&E to conduct such training programs has resulted in wildcat strikes being called against them. See *Bangor & Aroostook R. R. Co.* v. *BLF&E,* 255 F. Supp. 476 (D. D. C. 1966). Again, the record is clear that these training programs are strictly on the initiative of the BLF&E, as acknowledged by its chief witness at the trial:

"Q. And training to become an engineer after he has been a fireman doesn't take place for a few years, does it?
A. Not until after five years.
Q. So that after he has served as a fireman for five years he then would come to your school to take instructions to pass the engineer's examination?
A. That is correct.
Q. That school is a Brotherhood school?
A. That is correct.
Q. You run it?
A. That's right.
Q. The railroad doesn't have anything to do with it?
A. That's right."

It is not only illogical but the height of irony to use the training insisted upon and provided by the BLF&E to excise the term "helper" from the statute.

The BLF&E has also pointed to the presence of a fireman as the second man on passenger locomotives as a claimed concession by the Railroads that only a fireman may satisfy the "helper" requirement of Section 54-b. But again, a fireman, as opposed to a brakeman, is the second man on a passenger locomotive because the collective bargaining agreements with the BLF&E require him there (413a; 4910a) and the head brakeman is used in the train itself to assist the passengers (465a).

The Court of Appeals ignored the conceded fact that firemen are required to have no more qualifications than brakemen or other operating personnel; likewise, it ignored the refusal of some of the Railroads to require firemen to qualify as engineers; also, it ignored the fact that whatever

training the fireman does receive as an engineer on some Railroads is done on the initiative of the BLF&E. Its silence on these vital and conceded facts exposes more eloquently than words the obvious fallacy of its decision. The fact is that a fireman is not an assistant engineer and never has been regarded as such (1774a). The fireman's lack of qualifications as an engineer in fact formed the basis for a demand by the BLF&E that two engineers be assigned to diesel locomotives. This demand, the subject of intensive collective bargaining, was finally rejected. *Report of Emergency Board No. 68* (1949). Section 54-b does not require a second engineer on a locomotive, and it was error for the courts below to interpret the statute as requiring "an engine crewman fireman-type assistant to the engineer" (A-65).

THE QUESTION IS SUBSTANTIAL

Section 54-b of the New York Railroad law is unconstitutional special class legislation.

In effect the Court of Appeals held that a railroad commits a crime if it uses as a helper a brakeman who has passed the same physical examination a fireman takes, who has taken the same three student trips a fireman takes, and who has passed the same examination on the operating rules. Yet, according to the Court of Appeals, the same person hired as fireman and going through the identical process satisfies the requirement of a "helper".

This construction nowhere appears on the face of statute. On the contrary, it is reached only by excising the term "helper" from the statute and ignoring the indisputable facts of record. The Railroads contended against such a construction, pointing out that without any justification,

in fact it bestows upon the members of the firemen's union the sole and exclusive privilege of serving as helpers on diesels. The Court of Appeals, at the urging of the BLF&E, insisted upon such a construction, and in so doing, rejected the doctrine that this Court enunciated in *Smith* v. *Texas,* 233 U. S. 630.

That case involved a provision of the Texas Penal Code requiring all conductors on freight trains to have two years experience as brakemen. The Texas court had held this requirement to be a valid exercise of police power since conductors were normally promoted from the ranks of brakemen, just as engineers are normally promoted from the ranks of firemen. *Smith* v. *Texas,* 66 Tex. Crim. 383, 146 S. W. 900 (1912). This Court held (pp. 638-41):

> ". . . None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position.
>
> ". . . The statute does not require the brakeman to prove his fitness, though it does prevent all others from showing that they are competent. The act prescribes no other qualification, for appointment as conductor, than that for two years the applicant should have been a brakeman on a freight train, but affords no opportunity to any others to prove their fitness. It thus absolutely excludes the whole body of the public, including many railroad men, from the right to secure employment as conductor on a freight train.
>
> "For it is to be noted that under this statute, not only the general public, but also four classes of rail-

road men, familiar with the movement and operation of trains and having the same kind of experience as a brakeman, are given no chance to show their competency but are arbitrarily denied the right to act as conductors

* * *

"3. So that the case distinctly raises the question as to whether a statute, in permitting certain competent men to serve, can lay down a test which absolutely prohibits other competent men from entering the same private employment. It would seem that to ask the question is to answer it . . . A statute which permits the brakeman to act—because he is presumptively competent—and prohibits the employment of engineers and all others who can affirmatively prove that they are likewise competent, is not confined to securing the public safety but denies to many the liberty of contract granted to brakemen and operates to establish rules of promotion in a private employment.

"If brakemen only are allowed the right of appointment to the position of conductors, then a privilege is given to them which is denied all other citizens of the United States. If, the statute can fix the class from which conductors on freight trains shall be taken, another statute could limit the class from which brakemen and conductors on passenger-train could be selected, and so, progressively, the whole matter, as to who could enter the railroad service and who could go from one position to another, would be regulated by statute."

The lower courts seized upon the success of the BLF&E on some of the Railroads in requiring that firemen be trained as engineers and eventually qualify as such, and in some vague, unexplained way intimated that these requirements justify excision of the term "helper" from the statute. These requirements, however, are nowhere embodied in the statute, and the necessary consequence of the lower courts' construction has been to delegate to the BLF&E the power to determine in its sole and nonreviewable discretion the standards and qualifications for "helpers."

The lower courts also held by necessary implication that the qualifications for "helpers" can constitutionally vary from Railroad to Railroad because, as revealed above, the qualifications do in fact vary depending upon the bargaining strength of the particular local BLF&E lodge involved. But the Legislature cannot delegate its power to the BLF&E and it was an error for the Court of Appeals to confer upon the BLF&E the exclusive franchise to determine who shall and who shall not be the second man on the locomotive.* *Washington ex. rel. Seattle Trust Co.* v. *Roberge*, 278 U. S. 116.

The decision of the Court of Appeals is not only contrary to the doctrine set forth in *Smith* v. *Texas, supra* p. 15, but also is in conflict with the decisions in other states considering directly analogous problems.

Northern Pacfic Ry. Co. v. *Warren*, 77 N. D. 721, 45 N. W. 2d 196 (1950), struck down a law requiring flag-

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*In light of the total abdication of power to the BLF&E to determine who may be the second man on the engine, the extended discussion by the Court of Appeals of the inadvisability of permitting the Public Service Commission to exercise such power is puzzling (A-67-69).

men on ballasters to be train service employees. The court stated (45 N. W. 2d 204-205):

> "The record clearly shows that members of the maintenance of way gangs, customarily perform flagging duties and presumably they are competent to do so, for they regularly perform these functions. . . . The legislature has never by general law undertaken to establish standards for determining the qualifications of those who may perform flagging duties. . . . The attempt made to . . . exclude the employment of other flagmen who may be equally competent to perform the duties under consideration appears to be without reasonable justification, and is violative of Article 1, Section 20, of the North Dakota Constitution."

In *Missouri-Kansas-Texas Railroad Co.* v. *State,* 131 S. W. 2d 702 (Tex. Civ. App. 1939), *writ of error refused* (Tex. Sup. Ct. 1939), the court held that in absence of legislatively supplied standards and qualifications for the brakemen required by the Texas full crew laws "the presence of more than two men on [a construction train] who were fully qualified, trained and available to discharge all of the duties regular brakemen could have discharged, had they been present, was sufficient to meet the safety requirements contemplated by the statute, and that the law was not violated in this regard."

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *State,* 33 Ariz. 440, 265 Pac. 602 (1928), the court voided as unconstitutional a statute requiring anyone who received or transmitted train orders by telephone, including train crew members, to have at least one year's experience as a telegraph operator.

The main reason given by the Court of Appeals for its unconstitutional construction was its speculation that the Legislature intended the term "helper" to be a redundancy when it enacted the statute (A-62-64). It would be equally valid to speculate that in using the phrase "fireman or helper" the Legislature envisaged the eventual phasing out of the fireman on diesels as has been in fact the case in other states. But even if the Court of Appeals guessed right in the matter of legislative intent, it ignored at its peril the elementary principle of statutory construction that where one reading of the statute will save its constitutionality, and another reading will render it unconstitutional, the constitutional choice should be made. *United States* v. *Harriss,* 347 U. S. 612; *United States* v. *C. I. O.,* 335 U. S. 106; *Chippewa Indians* v. *United States,* 301 U. S. 358.

The Court of Appeals hailed the Public Service Commission of New York as being "knowledgable in railroad problems" and imbued "with the history and development of statutes and public regulation affecting railroads" (A-65). Notwithstanding this recognition of expertise in dealing with the issue before it, the Court of Appeals chose to ignore the interpretation the Commission gave to the term "fireman or helper." This interpretation is at direct odds with that of the Court of Appeals. New York Public Service Commission Case No. 24598, *Complaint of BLF&E against Canadian National Railway* (1968), printed as an appendix to this statement at A-78.

That case passed upon the legality of the assignment by the Canadian National Railway of a brakeman (yardman) to act as "a helper who is to assist the engineer." The BLF&E maintained that a fireman was required on the locomotive. The Commission dismissed the complaint finding (A-86-87):

"Much of the record is concerned with the relative qualifications of the fireman-helper and the yard helper. Both must pass a physical examination before being hired and pass the same examination on the company's operating rules. Each makes three trial runs, the fireman-helper receiving instruction as to his duties on the engine and the yard helper on the handling of cars. The fireman-helper receives training thereafter in preparation for qualification as an engineer."

* *

"It appears that the yard helper and the yard foreman are both qualified by training in the company's operating rules to perform the required duties of firemen-helper in the transfer operation under consideration. It is recommended, therefore, that the complaint be dismissed."

The statement by the Court of Appeals that "[T]here cannot be the slightest doubt" that the Public Service Commission construed § 54-b as requiring an assignment "which would not be satisfied by the presence of a brakeman" is, to say the least, a slight exaggeration (A-65).

The record bears out the conclusion of the Public Service Commission. It shows that head brakemen regularly act as helpers to the engineers (884a-85a; 2661a-64a). The lower courts made no comment on the evidence of operations without firemen on the Canadian Pacific (2515a-41a). This silence is as significant as the failure to discuss the decision of the Public Service Commission. That evidence showed that the head brakeman on the Canadian Pacific for years has rendered all the help that the engineer requires in freight and yard operations (2572a-75a; 2580a-83a). Similarly, the lower courts made no comment on the evidence of operations in adjoining states without firemen (*e.g.*

3665a-71a). Instead, they proceeded on the premise that the law requires a helper to be a second engineer. But the law does not read that way and, besides, the fireman in many instances is not such a person (1774a).

Respondents may urge affirmance of the decision below on the strength of the recent decision by this Court in *BLF&E* v. *Chicago, R. I. & P. R. Co.*, U. S. , 89 S. Ct. 323, 37 U. S. L. W. 4032 (November 18, 1968), upholding the Arkansas minimum crew laws. With respect to this argument we cannot improve upon the position set forth by the BLF&E in its argument to the Court of Appeals in this case:

> "The distinction between the Arkansas case, where the sole alleged vice of the statute was the requirement of a six-man crew, and this case is stated by the appellants themselves who assert (Br. 47):
>
> > 'The vice in Section 54-b is not that it requires a two man crew, but rather that it requires the Railroads to employ a so-called fireman in every freight and yard operation throughout the State. They must do so regardless of how many other qualified men are available in the crew to help the engineer.'"

In the final analysis the propriety of the decisions below hinges upon the following analysis by the trial court, implicitly adopted by the Court of Appeals (A-28):

> "Even if it be assumed that in road freight service the head brakeman is in all respects as competent as the fireman to perform and does adequately perform the duties assigned to both which are necessary in the interest of safety, it may not be held that the statutory rule is unconstitutional because the railroad rule adequately protects against the same hazards."

The foregoing statement is a masterpiece of illogic. The Railroads do not say that the helper to the engineer must be a brakeman and only a brakeman. What they do say is that given the conceded facts that brakemen receive the same training as firemen, that they act as helpers to the engineers in Canada and other states and that use of firemen having no more training or qualifications than brakemen satisfies § 54-b, they cannot be constitutionally required to use firemen to the total exclusion of brakemen.

In point of fact, the lower courts, not the Railroads, are the ones who are relying upon the rules and practices forced upon some, but not all, of the Railroads by the BLF&E to sustain the constitutionality of § 54-b as special interest legislation. But there is nothing in the law requiring these programs and in fact they have not been carried out by some of the Railroads. Yet all of the Railroads have concededly been complying with the law since its inception.

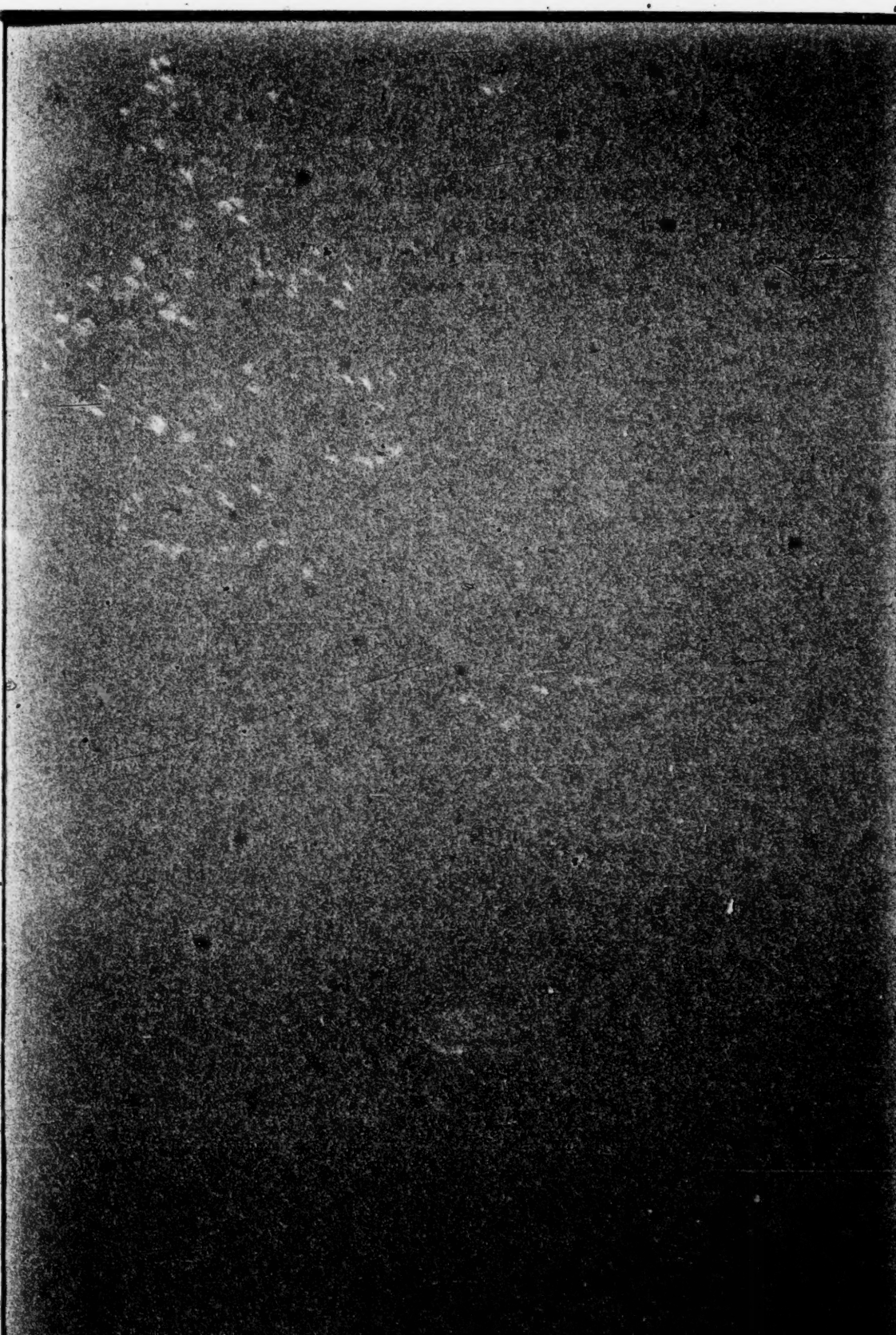
CONCLUSION

The Railroads of the State of New York are under an unconstitutional compulsion to provide employment to the members of a labor union solely on the basis of their being labelled "firemen." The decision of the Court of Appeals should be reversed.

Respectfully submitted,

JOHN A. WELLS
CAESAR L. PITASSY
DAVID F. DOBBINS
IAN R. GILBERT
200 Park Avenue
New York, New York 10017

Of Counsel:
GERALD E. DWYER
New York, New York
VICTOR F. CONDELLO
New York, New York
ROYALL, KOEGEL, ROGERS & WELLS
New York, New York



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 914

THE NEW YORK CENTRAL RAILROAD COMPANY; ERIE-LACKAWANNA RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE LONG ISLAND RAIL ROAD COMPANY; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor; LEHIGH VALLEY RAILROAD COMPANY; BOSTON AND MAINE RAILROAD; THE DELAWARE AND HUDSON RAILROAD CORPORATION; THE BALTIMORE & OHIO RAILROAD COMPANY; and THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Appellants,

—against—

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York; and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; and LEONARD RUBENFELD, as District Attorney of Westchester County,

Respondents,

—and—

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN,

Intervenors-Respondents.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPENDIX TO JURISDICTIONAL STATEMENT

JOHN A. WELLS
CAESAR L. PITASSY
DAVID F. DOBBINS
IAN R. GILBERT
200 Park Avenue
New York, New York 10017

Of Counsel:
GERALD E. DWYER
New York, New York
VICTOR F. CONDELLO
New York, New York
ROYALL, KOEGEL, ROGERS & WELLS
New York, New York

INDEX TO APPENDIX

	PAGE
OPINION OF THE TRIAL COURT	A-1
OPINION OF THE APPELLATE DIVISION	A-56
OPINION OF THE COURT OF APPEALS	A-58
RELATED OPINION OF THE PUBLIC SERVICE COMMISSION	A-78

Supreme Court

OF THE STATE OF NEW YORK

COUNTY OF WESTCHESTER

THE NEW YORK CENTRAL RAILROAD COMPANY; ERIE-LACKAWANNA RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE LONG ISLAND RAIL ROAD COMPANY; THE BALTIMORE AND OHIO RAILROAD COMPANY; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor; LEHIGH VALLEY RAILROAD COMPANY; BOSTON AND MAINE RAILROAD; THE DELAWARE AND HUDSON RAILROAD CORPORATION; and THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Plaintiffs,

—against—

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York; and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; and ROBERT J. TRAINOR, as District Attorney of Westchester County,

Defendants,

—and—

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN,

Defendants-Intervenors.

Opinion of the Trial Court

NOLAN, *J.*

The plaintiffs, ten Class 1 railroads, all engaged in the business of transporting freight, or freight and passengers, in interstate commerce, in the State of New York, have brought this action for a judgment declaring Sections 54-a,

54-b, and 54-c of the Railroad Law of the State of New York, commonly known as the "Railroad Full Crew Laws", unconstitutional, and enjoining the defendants from enforcing them. Defendants are public officers, charged with the duty of enforcing the law, and the Intervenors-Defendants are labor organizations which represent operating employees of the Railroads.

Section 54-a (Laws 1913, c. 146, as amended Laws 1921, c. 290) provides as follows:

> "No person, corporation, trustee, receiver, or other court officer, shall run or operate, or cause to be run or operated, outside of the yard limits, on any railroad of more than fifty miles in length within this state, a freight train of more than twenty-five cars, unless said train shall be manned with a crew of not less than one engineer, one fireman, one conductor and three brakemen; nor any train other than a freight train of five cars or more, without a crew of not less than one engineer, one fireman, one conductor and two brakeman, and if the train is a baggage train or a passenger train actually carrying baggage, without a baggageman in addition to said crew; nor any freight train of twenty-five cars or less without crew of not less than one engineer, one fireman, one conductor and two brakemen; nor any light engine without a car or cars, without a crew or not less than one engineer, one fireman and one conductor or brakeman. * * *"

Section 54-b (Laws 1936, ch. 777) provides that:

> "No person, corporation, trustee, receiver or other court officer shall run or operate, or cause to

> be run or operated, on any railroad within this state any fuel-electric engine, unless said engine shall be manned with a crew of not less than one engineer and one fireman or helper. * * *"

and it is provided by Section 54-c (Laws 1937, ch. 903) that:

> "No person, corporation, trustee, receiver, or other court officer, shall run or operate, or cause to be run or operated, on any railroad of more than fifty miles in length within this state any locomotive, engine, motor or self-propelled unit operated by any form of energy, except a multiple-unit car or cars, while engaged in switching car or cars, or transferring, as a switching movement, a car or cars from one railroad to another or from one railroad yard to another railroad yard, without a crew consisting of not less than one engineer, one fireman or helper, one conductor or foreman and two trainmen or two helpers. * * *"

Violations of these statutes are misdemeanors.

Plaintiffs assert that the full crew laws have no reasonable relationship to the safety of the operation of their railroads or to the safety of the public or plaintiffs' employees, and that their effect is to compel them to employ unnecessary firemen, brakemen, trainmen and baggagemen without regard to operating conditions, safety or efficiency, at a total cost of over $12,000,000.00 annually. The imposition of this burden, they claim, constitutes, in the absence of reasonable justification therefor, a confiscation of their property without due process of law, in violation of Article I, Section 6 of the Constitution of the State of New York,

and of the Fourteenth Amendment to the Constitution of the United States. Plaintiffs further allege that by the enactment of these statutes the Legislature singled out the railroad industry and imposed on it alone, the requirements of the laws with respect to the minimum number of employees which must be assigned in the operation of its business, and that by so doing, and by providing by Sections 54-a and 54-c that these statutes apply only to railroads of more than fifty miles in length, the Legislature has denied to plaintiffs equal protection of the laws, contrary to Article I, Section 11, of the Constitution of the State of New York, and the Fourteenth Amendment to the Constitution of the United States. It is further claimed that the statutes under attack constitute a direct interference with and burden on interstate and foreign commerce in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, and that because of the enactment in 1963 of United States Public Law 88-108, 77 Stat. 132, establishing an Arbitration Board charged with the duty of making a binding award with respect to the use of firemen on other than steam powered locomotives, and with respect to freight train and yard crew consists, and by virtue of the fact that an award has been made by the Board, the full crew laws, insofar as the crew consists thereby provided for differ from the consists determined by the award, are void as repugnant to the second clause of Article VI of the Constitution of the United States, commonly known as the "Supremacy" clause.

In support of their claim that the full crew laws are unreasonable and arbitrary, plaintiffs, although they did not concede that the laws were valid when enacted, took the position on trial that they had made, and were continu-

ing to make, technological improvements upon their railroads which had promoted their safety and reduced the hazards of their operation to such extent that no matter what validity the statutes might have had, their application to plaintiffs' operations is so unreasonable and burdensome under present conditions as to constitute a deprivation of property without due process of law.

The answers of the defendants deny certain of the material allegations of the complaint, and that of the defendant Public Service Commission demands no relief but submits the issues to the court for determination. The defendants-intervenors have denied material allegations of the complaint, and have asserted several affirmative defenses which do not require discussion at this point.

Controversy concerning full crew laws and rules is not of recent origin. The first New York State full crew law entitled, "An Act to Better Protect the Lives of Railroad Employees", was passed by the legislature in 1907. The statute required on freight trains of more than twenty cars a minimum crew of six, consisting of an engineer, a fireman, a conductor and three brakemen. It was disapproved by Governor Hughes because it took no account of differences between different roads and parts of roads in trackage and switching facilities, and of the fact that what might be necessary in the case of some railroads might be wholly unnecessary in others. It was the Governor's opinion that to require the expenditure of a very large amount of money without necessity for the outlay, was simply arbitrary exaction and a taking of property without due process of law. Nevertheless, a few years later the Supreme Court of the United States held that a statute of the State of Arkansas, also enacted in 1907,

which prohibited the operation of freight trains with a crew of less than an engineer, a fireman, a conductor and three brakemen, regardless of any modern equipment of automatic couplers and air brakes, was constitutional, as against claims that the employment of a third brakeman was unnecessary, because there were no duties for him to perform, and that the plaintiff railroad was thereby required to expend a large amount of money for a useless purpose, and was deprived of its property without due process of law (*Chicago, R. I. & Pac. Ry. Co.* v. *Arkansas,* 219 U. S. 453).

Again, in 1912, a law similar to the 1907 statute passed the New York State legislature and was vetoed by Governor Dix for reasons, except that of unconstitutionality, similar to those which had been previously stated by Governor Hughes.

Section 54-a of the Railroad Law was enacted in 1913. It was approved by Governor Sulzer. In his memorandum of approval, the Governor stated:

> "The State for its own welfare has the right to demand the employment upon the railroads of every safety appliance, whether mechanical or human, in the interest of life and limb and greater safety standards.
>
> * * *
>
> Every safeguard it seems to me should be employed by the railroads to prevent wrecks, to protect the property of shippers, and to conserve human life and limb—not only of the employees but of the traveling public. The progressive spirit of the times demands it, and the trend of present-day legislation is all that way.

Opinion of the Trial Court

> The inauguration of these reforms, in my opinion, will create greater safety, and establish more efficiency in the operation of railway transportation, * * *."

Section 54-b was enacted in 1936. In approving it, Governor Lehman stated that he believed "that the greatest care should be taken to protect human life, even though a slight additional expense has to be incurred by the railroads."

In 1937, section 54-c was enacted, and was approved by Governor Lehman.

With the exception of a slight amendment to section 54-a in 1921, these statutes have remained unchanged since the respective dates of their enactments, despite repeated proposals to repeal them.

In January, 1959, the Public Service Commission of the State of New York, in making a report as to the financial status of railroads operated in this state recommended legislative reconsideration of the full crew laws, and in the same year by concurrent resolution the legislature directed the Commission to undertake a comprehesive and impartial study, analysis, and investigation of the laws for the purpose of determining the relationship between such laws and the requirements of the safety of railroad operations involved, the railroad employees engaged therein, and the public. After hearings at which proof similar to that presented on the trial of this action was adduced before the Commission, it reported that no justification could be found for continuing to single out the railroad industry and to subject it to unusual and extreme statutory mandates contained in the full crew laws, and that irrespective of the

justification, if any, for the original enactments; there was no longer any reasonable relationship between the statutory full crew requirements and the safety of the railroad operations involved, the employees engaged therein, and the public, and that the repeal of the laws was required. The Commission, however, although of the opinion that the laws were unjust, and arbitrary because of their mandatory and inflexible requirements, and that if crew consists of railroads were to be subject to control, some flexibility was essential to meet varying conditions, did not find that no necessity existed, in the interest of safety, for regulation of railroad crew consists. On the contrary, the Commission was of the opinion that there were sound and compelling reasons for subjecting the judgment of railroad management in such matters as crew consist practices to the regulatory control of an agency such as the Commission, and reported that the repeal of the laws would not jeopardize the safety of railroad operations or of railroad employees, or the public, since the Commission, upon the event of such repeal would be free to exercise control and to prescribe such minimum crew requirements as might reasonably appear to be required in the interest of safe and adequate railroad operations and service. The Commission submitted with its report and recommendation a complete transcript of the record of its hearings, including statements made and evidence presented in support of and in opposition to the laws under consideration. Presumably its recommendation was given due consideration by the legislature, but it was not adopted. Since that time, and particularly in the last five years, legislation to repeal the full crew laws has been presented to and introduced in the legislature, and their repeal has been recommended by the Governor. Neither the Governor's recommendation, nor the legislation introduced, has

been adopted. On the other hand, attempts to persuade Congress to adopt a national railroad full crew law have been equally unsuccessful.

Insofar as firemen were concerned, there was little need for such legislation. Although firemen were unquestionably necessary members of the locomotive crew on the steam locomotive, with the advent of the diesel locomotive, their traditional "firing" duties disappeared. Since 1937, however, and until 1964, the so-called National Diesel Agreement required the use of firemen (helpers), taken from the ranks of the firemen, on main-line passenger trains, and on practically all freight and yard diesel-electric locomotives. No national rule or agreement existed, however, with respect to the consist of other members of the crew. The make-up of such crew consists was provided for by a number of work rules and practices, some systemwide and some local, and by laws and regulations in some states. When this action was commenced, sixteen states, including New York, had laws specifically establishing crew consist minima, and seven other states empowered regulatory commissions to impose such minima. Three had done so.

Most of these laws were enacted before 1920, and most of the rules, regulations and practices were formulated or developed more than thirty years ago. Laws in four of the full crew states have recently been repealed, and some others have been declared invalid or unenforceable by the courts.

In November, 1959, the railroads sent notices pursuant to Section 6 of the Railway Labor Act (U. S. Code, Title 45, Section 156) proposing *inter alia* the elimination of all agreements, rules, regulations, interpretations and practices, however established, which required the employment of use

of firemen (helpers) on other than steam power, in any class of freight or yard service, and the adoption of a rule giving management the unrestricted right to determine when and if a fireman (helper) should be used in such services. The proposal did not contemplate the elimination of firemen on locomotives used in passenger service, nor, obviously, did it contemplate the elimination of full crew laws, through the process of collective bargaining. The notices also proposed the elimination of all rules, agreements, regulations, and practices fixing the size of train crews and the establishment of a rule giving management the right to determine how train crews should be made up. Obviously, again, those notices did not propose the elimination of state full crew laws affecting train crews. The employees' organizations, in turn, served notices, in September, 1960, which proposed the establishment of rules or agreements which would provide for the continuation, and extended use of firemen and would have required two trainmen and one conductor in all train crews, plus such additional crewmen as would be required to assure maximum safety.

To settle the differences which existed, after negotiation had failed to bring about a solution, the President of the United States, pursuant to agreement between the railroads and organizations representing their employees, by order effective January 1, 1961, appointed a special commission, known as the Presidential Railroad Commission, to investigate the facts and report its findings and recommendations to the President. That commission concluded that firemen-helpers were not so essential for the safe and efficient operation of road freight and yard diesels that there should continue to be either a national rule or local rules requiring their assignment on all such diesels. With respect to train

crew consists, the commission concluded that there was some overmanning in road and yard services under existing practices, but little undermanning, but that the carriers should not have unlimited discretion to determine crew consists, nor should there be a national rule freezing minimum crew consists as proposed by the employees' organizations. The commission made certain settlement proposals, which were not accepted.

Further negotiations under the Railway Labor Act were unsuccessful. An emergency board was appointed, which also made proposals to settle the issues, but they were not found to be acceptable. The Secretary of Labor joined in the negotiations and on August 2, 1963, submitted a memorandum defining the issues, and endeavoring to indicate the areas in which agreement was possible. Plans for voluntary arbitration were proposed and rejected. A nation-wide railway strike was imminent. To avert this disaster, Congress passed a joint resolution, which was approved by the President on August 28, 1963 (Public Law 88-108; 77 Stat. 132).

This enactment prohibited a strike or any change except by agreement or arbitration, as provided therein, in rates of pay, rules or working conditions encompassed by any of the notices theretofore served by the railroads or the employees' organizations, and authorized the creation of an arbitration board of seven members, two to be designated by each of the contending factions, and three to be neutral members, appointed by the other four, or if they were not so appointed, to be designated by the President. The Secretary of Labor was directed to furnish to the board and to the parties copies of his statement of August 2, 1963, setting forth the matters in which the parties were in tentative agreement, and the extent of disagreement with respect to other matters and the arbitration board was directed to make a binding award with respect to the firemen

and crew consist issues as raised by the notices served by the carriers and by the employees' organizations. The award when made was to continue in force for a period not to exceed two years unless the parties should otherwise agree. All other issues were to be decided through collective bargaining.

The board was directed in making the award to give due consideration to its effect on adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, and to give due consideration to the narrowing of the areas of disagreement which had been accomplished in collective bargaining. No mention was made in the law of the state full crew statutes, or of any congressional intent to occupy or not to occupy the field in which they operated. The board filed its award on November 26, 1963, and it became effective on January 25, 1964. The award, was accompanied by an opinion by the neutral members, in which they stated that the record "contained no evidence to support the charge, frequently and irresponsibly made, that firemen presently employed in road freight and yard service throughout the country are being paid for doing nothing, and actually perform no useful work." They noted, however, that the lookout function assigned to the fireman was also performed by the head brakeman in road freight service, and by all members of the crew in yard service. It was their opinion that in the great majority of cases the lack of a fireman to perform the related functions of lookout and signal passing would not endanger safety or impair efficiency and that a considerable portion of the mechanical duties now performed by the firemen was "not absolutely essential" to the safety and efficiency of road freight and yard operations, since these duties could be

performed by the engineer while the engine was in service, and by shop maintenance personnel at other times.

It was their conclusion that although firemen were performing useful services, they were not so essential for safe and efficient operation that there should continue to be either a national rule or local rules requiring their assignment on all diesels. Nevertheless, they also found that a certain number of assignments required the continued employment of firemen "in order to prevent excessive safety hazard to lives and property * * * and to secure adequate and safe transportation to the public," and considered it essential in yard service, if locomotives were to be operated without firemen, that "deadman" controls be installed therein. Accordingly, the board made an award which provided with respect to firemen on other than steam power in freight and yard service that all agreements, rules, regulations and practices, however established, shall continue undisturbed, except as modified, provided for procedures designed to eliminate all but at least ten per cent of such firemen assignments, and directed that after thirty-seven days the carriers should not be required to use firemen other than in crews designated pursuant to the procedure provided. The award provided, nevertheless, that with some exceptions all firemen hired more than two years prior to the effective date of the award should retain their rights to employment and seniority until death, retirement, resignation, or discharge for cause.

With respect to the crew consist issue the board found that some overmanning existed in road and yard crews and that there was a possibility that there was undermanning on some assignments, but concluded that the consist of crews necessary to assure safety and to prevent undue work loads must be determined primarily by local conditions.

Consequently they found both the proposals by the carriers and the employees' organizations unsatisfactory and remanded the issue for local negotiation, providing that if no agreement could be reached with respect to crew consists in stated categories the issues should be decided by special boards of adjustment, and laid down comprehensive guide lines to govern the determinations of such boards. Again, as in the case of the firemen, the board provided substantially that trainmen and similar employees, other than those on furlough, should retain their rights to service assignments to the extent of available positions, and that the reduction in jobs should be accomplished only through natural attrition.

Pursuant to the award of the Arbitration Board, plaintiffs are now operating locomotives, outside the "full crew" states, without firemen, and in full crew states, as well as in those which have no such statutes, special boards of adjustment have met and in a number of cases have approved changes in rules which appear to permit the operation of trains with crews consisting of fewer trainmen than were required under former rules, or the full crew laws. The award of the Arbitration Board has been filed as required by Section 9 of the Railway Labor Act (U. S. C. A. Tit. 45, sec. 159) and judgment has been entered thereon, despite actions brought to impeach it (See *Brotherhood of Locomotive Firemen and Engineers* v. *Chicago, Burlington & Quincy R. R. Co., Brotherhood of Locomotive Engineers* v. *Union Pacific R. R.*, 255 F. Supp. 11, affd. 331 F. 2d 1020, cert. denied 377 U. S. 918). Unquestionably the federal statute is the supreme law of the land (U. S. Constitution, Article VI) and if there is a conflict between the full crew laws and the federal statute, and the award made pursuant thereto, to such extent that they can not be reconciled or consistently stand together, the full crew laws, even

though enacted in the exercise of the police power of the state, must yield. That question, as well as the other issues of law which are presented, will be discussed after a further statement of the facts which are considered to be essential.

As their history indicates, the full crew laws were enacted to promote safety in railroad operations and, insofar as due process is concerned, the questions presented involve their relationship to that legislative purpose, particularly in the light of present conditions.

Unquestionably, since their enactment, there have been numerous important improvements in railroad technology, and many changes in traffic conditions and operational procedures. One of the most important of the technological improvements has been the development of the diesel electric and the electric locomotives, which have eliminated entirely the traditional "firing" function of the firemen and have left them free to devote considerably more time to the performance of other duties assigned to them. Diesel electric locomotives are used exclusively in both passenger and freight railroad operations in this state, except in certain electrified areas, where electric locomotives and multiple unit electric cars may be used. With such locomotives there are smoother starts and stops with the result that there are fewer shocks to the train and reduced discomfort and hazard to crew members and passengers. Dynamic braking has resulted in reduction of wear on brake equipment and overheating of wheels and brake shoes. Engine consists in freight operations are ordinarily made up of multiple diesel units which are better able to haul heavy tonnage on grades, eliminating the need for cutting the train into sections, and the hazards involved in the duties formerly imposed on crew members during such operations.

It would inordinately prolong this statement to separately set forth the improvements made by each of the plaintiff railroads since the enactment of the full crew laws, nor is it essential to do so. It is sufficient to say, although technological improvement has not been uniform among the plaintiff railroads, in the sense that each has made the same improvements to the same extent, that the evidence establishes a consistent pattern of improvement, and that by reason thereof railroad operations are considerably safer today then they were when the full crew laws were enacted. Air brake systems and coupling devices have been considerably improved. Cast iron wheels have been replaced by steel, and steel has replaced wood in the construction of freight cars and cabooses. Roller bearings have to some extent replaced the older friction type, and considerable improvement has been made in the lubrication of the friction type bearings by substituting lubricating pads for the old waste packing, thus reducing the danger of derailments caused by "hot boxes." Rails are heavier, their length has been increased, considerable progress has been made in the installation of continuous welded rails, and their controlled cooling in the manufacturing process, and mechanized equipment is used in track maintenance. Stone ballast has been installed and roadbeds have been improved by the use of chemically treated ties. The old semiphore signal has for the most part been replaced by the introduction of electric colored light and light position signals.

Electrical hot box detectors have been installed by some railroads, as well as dragging equipment detectors, and slide fences, all of which tend to reduce the danger of derailments. Ultrasonic devices are used to discover defects in rails and broken flange detectors have also been installed in some locations. Considerable use is made of automatic

train stop devices, which operate the brakes when the engineer fails to respond to a restrictive signal, and to some extent "dead man" controls have been installed in locomotives. Vertical wheel power brakes have been substituted at the ends of freight cars for the old horizontal wheel brake formerly located above the car roof, and non-spin brakes have been installed. Centralized traffic control systems have been put into operation and other improvements have been made in automatic block signals and traffic control to reduce the danger of collisions. Communication facilities have been improved by the development of telephone and radio systems permitting communication between head and rear ends of trains, from train to train, and from trains to stations. "Walkie-talkies" are used, in communication between train crews and trains, and telephone systems are used in train dispatching and for communication between trains and control points. Retarders are used in gravity-switching yards and progress has been made in electronic control of yard switching operations.

The foregoing list is not complete, and as has been stated does not accurately show the extent of improvements made by each railroad. It does show, however, an impressive record of improvement in technology, which has tended to decrease substantially the hazards of railroad operation, to railroad employees and the public, and lends considerable force to plaintiffs' argument that in the light of present conditions the full crew laws are obsolete and have no reasonable relation to the safety of railroad operations.

On the other hand, the evidence establishes that the average size of freight cars, the length of trains, and the speed at which they are operated have increased. Mal-

functions in safety devices, including radio equipment, and in diesel engines and equipment, are not so uncommon that they should not reasonably be anticipated, and despite the installation and use of safety devices, hot boxes and dragging equipment still constitute hazards which require constant vigilance, if they are to be detected in time to prevent accidents. Collisions, derailments and other accidents still occur despite technological advances. With respect to those accidents statistics were produced by both sides, which purported to show trends in increase and decrease of various types of accidents, in New York state and elsewhere, during the years within which the full crew laws have been in effect. I have given consideration to that evidence, but am unable to find, in the absence of more adequate information as to the circumstances attending the accidents reported, any logical connection between the conclusions expressed, and the presence or absence of full or minimum crews on the railroad trains involved therein.

A considerable volume of opinion evidence was introduced by plaintiffs and the intervenors-defendants as to the relation between the functions performed by firemen and alleged excess brakemen in road and freight and switching operations, and the safety of the operations involved. Although it is debatable whether opinion evidence was properly admissible on the issues presented, I have given it consideration, but have not found it helpful. The witnesses who gave these opinions were well qualified, and apparantly sincere in their beliefs, but they were not impartial, and to some extent the opinions which they expressed were not supported by the facts, or by the reasons given therefor. Despite evidence introduced by plaintiffs to the contrary, I find that the services performed by the firemen and the brakemen

and trainmen claimed to be excessive do have a relationship to safety, and contribute to the safety of the operations in which they are engaged. That, however, is not precisely the question to be determined. What plaintiffs claim is that the contribution, if any, is so unsubstantial and cumulative that the services of these employees can be dispensed with without sacrifice of safety, and that they are compelled by the laws under attack to employ unnecessary employees at great expense and are thus deprived of their property without due process. If this claim has been established by evidence of the quality which the law demands, plaintiffs are entitled to relief. The legislature may not, under the guise of protecting the public interest, arbitrarily interfere with or impose unreasonable restrictions on the lawful operations of the railroads (Cf. *Weinberg* v. *Northern Pac. Ry. Co.*, 150 Fed. 2d, 645, 651).

Although the evidence is of doubtful competency (Cf. *Richards* v. *Robin,* 178 App. Div. 535, 539, and American Law Institute Model Code of Evidence, Rule 515 and comment thereon), I have considered the relevant findings of fact, including factual conclusions contained in the reports of the Presidential Railroad Commission (1962) and the Public Service Commission (1960) heretofore referred to, as well as the report of the "Royal Commission on Employmen of Firemen on Diesel Locomotives in Freight and Yard Service, in the Canadian Pacific Railway" (1957) as prima facie proof of the facts and conclusions stated, and have taken note of the opinions expressed. None of these commissions, however, was required to nor did any of them determine the precise question before the court in this action nor were they concerned in making their determinations

with questions concerning the burden of proof which plaintiffs must sustain if they are to be successful here.

The rules of law which must be applied in determining whether plaintiffs' claim of denial of due process has been established, have been frequently stated.

Legislation designed to provide public safety carries with it a strong presumption of validity when challenged in the courts (*Bibb* v. *Navajo Freight Lines,* 359 U. S. 520, 524) as well as a rebuttable presumption of the existence of the necessary factual support for its provisions. If any state of facts, known or which may reasonably be assumed, justifies the law, the court's power of inquiry ends (*U. S.* v. *Carolene Products Co.,* 304 U. S. 144, 152, 154). Questions of wisdom, need, or appropriateness are for the legislature (*Olsen* v. *Nebraska,* 313 U. S. 236, 246). Courts strike down statutes only as a last resort, and only when unconstitutionality is shown beyond a reasonable doubt. But for all that, due process demands that a law be not unreasonable or arbitrary, and that it be reasonably related and applied to some actual and manifest evil which, however, need only be reasonably apprehended. And even though the police power enactment may have been valid when made, later events may show it to be arbitrary and confiscatory (*Abie State Bank* v. *Bryan,* 282 U. S. 765, 772; *Defiance Milk Products Co.* v. *Dumond,* 309 N. Y. 537, 541; *Matter of Spiesvogel* v. *Ford,* 1 N. Y. 2d, 558-562; *Wiggins* v. *Somers,* 4 N. Y. 2d, 215, 218, 219). When the subject of legislation lies within the police power of the state, fairly debatable questions as to reasonableness are not for the courts, but for the legislature (*Ferguson* v. *Skrupa,* 372 U. S. 726; *Sproles* v. *Binford,* 286 U. S. 374, 388, 389; *Standard Oil Co.* v. *City of Marysville,* 279 U. S. 582, 584; *Lincoln Building Associates* v. *Barr,* 1 N. Y. 2d, 413, 415).

In the only full crew cases which reached the Supreme Court of the United States, the full crew laws of Arkansas were held to be constitutional against attacks on the ground that they violated the due process and equal protection clauses of the Fourteenth Amendment, and the commerce and supremacy clauses of the United States Constitution, in that they were repugnant to the comprehensive scheme of federal regulation provided by the Interstate Commerce Act, and in conflict with the spirit of the Railway Labor Act. The Arkansas laws required a crew of one engineer, one fireman, one conductor and three brakemen on freight trains of a least twenty-five cars on any railroad of at least fifty miles in length, and a crew of an engineer, a fireman, a foreman and three helpers in switching and transfer operations across public crossings within city limits (*Chicago, R. I. & Pac. Ry. Co.* v. *Arkansas, supra,* 219 U. S. 453; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Arkansas,* 240 U. S. 518; *Missouri Pac. Ry. Co.* v. *Norwood,* 283 U. S. 249, 290 U. S. 600).

In sustaining the constitutionality of the statute which required three brakemen on trains of twenty-five cars or more against the claim that it deprived the railroad of its property without due process of law, the court stated:

> "Under the evidence, there is admittedly some room for controversy as to whether the statute is or was necessary; but it cannot be said that it is so unreasonable as to justify the court in adjudging that it is merely an arbitrary exercise of power and not germane to the objects which evidently the state legislature had in view. It is a means employed by the State to accomplish an object which it is entitled to accomplish, and such means, even

if deemed unwise, are not to be condemned or disregarded by the courts, if they have a real relation to that object." (*Chicago, R. I. & Pac. Ry. Co.* v. *Arkansas, supra,* at p. 466).

Plaintiffs do not complain, of course, that firemen were unnecessary employees when Section 54-a of the Railroad Law was adopted in 1913, and in view of the nature of the issues presented in this action and the provisions of Section 54-b and 54-c it is not necessary to determine whether Section 54-a, which was enacted in the era of the hand-fired steam locomotive, now requires the employment of a fireman on diesel electric locomotives. I shall assume, without so deciding, that it does, in view of plaintiffs' claim that each of the sections of the Railroad Law under attack burdens them with the employment of firemen who perform no necessary functions. It may be noted in passing, however, that when Section 54-a was enacted it was contemplated that railroads might be operated in this state by forms of power other than steam (See Public Service Commission Law, Sec. 2, subd. 6, Laws 1910, Chap. 480). However, no matter what Section 54-a requires with respect to firemen, the question which must be determined is whether it was unreasonable to require the employment of firemen (or helpers) on diesel electric and electric locomotives in 1936 and 1937, and if not whether that requirement is unreasonable under present conditions, or at least whether the question of reasonableness is fairly debatable so as to preclude its determination by the courts.

Sections 54-b and 54-c, as has been stated, require that fuel electric engines run or operated on any railroad in this state be manned by a crew of not less than one engineer, and one fireman or helper, and that no locomotive, motor or self-

propelled unit operated by any form of energy, except a multiple-unit car or cars, shall be operated on railroads of more than fifty miles in length in switching or transfer operations, without a crew which shall contain a fireman or helper. The words fireman or helper were used to designate the second man in the engine crew and by the requirement that a fireman or helper must be present in the cab of the locomotive, the legislature appears to have recognized that to secure safety in railroad operations certain duties should be performed by someone qualified to perform them (Cf. *Bressler v. Chicago & N. W. R. Co.*, 42 N. W. 2d, 617). The statutes do not specify what those duties are but in the absence thereof the requirement could only have been intended to mean such duties as were generally associated with the position of fireman, or helper, as the second man in the engine crew was sometimes referred to on locomotives such as the diesel-electric, on which the work of firing the boiler was not required to be performed.

Since the early days of railroading the engine crew has customarily consisted of an engineer, responsible for the operation of the locomotive, and a fireman, who under the jurisdiction of the engineer has been responsible for the production of power. It was the duty of the fireman on the steam-powered locomotive to maintain the fire, and to maintain a proper water level in the boiler. When not so engaged, however, he assisted the engineer in the observance and calling of signals, and acted as a lookout on the left side of the locomotive. He assisted the engineer in the repair of hot journals, and under his direction in some details of the operation and lubrication of the locomotive. He was required in case the engineer should become incapacitated to take over and bring the engine to a stop. Although his lookout and signal passing duties were necessarily limited on the

hand fired steam locomotive, they were more extensively performed in locomotives equipped with mechanics stokers, and on the oil burning locomotives. With the advent of the diesel-electric locomotive, the fireman, or helper, continued to perform duties which were different but similar to those that were performed by the fireman on the coal or oil burning locomotives. He did not, of course, tend fires or maintain the water level in the boiler. He did, however, perform comparable duties in connection with the operation of the new type of locomotive. Under present conditions the firemen, or helpers, on diesel-electric or electric locomotives have a variety of duties, some prescribed by rule, and some by custom and practice. The fireman (or helper) sits on the left side of the locomotive cab, and it is his duty to act as a lookout on the left side of the train. In some types of locomotives the engineer has a reasonably complete view of the track ahead, on both right and left. On others and in certain types of operation, his view to the left or to the side opposite to that in which he sits is obstructed either by the structure of the locomotive or, in pushing operations, by cars ahead of the locomotive. It is the duty of the fireman, as well as that of any other crew member who may be in the locomotive cab on road freight service to observe and call signals, to observe the condition of his own train, to be alert for objects on or approaching the tracks ahead of the train, and to receive and transmit to the engineer signals from passing trains, or towers or stations on the left hand side of the train. It is also his duty to see that signals are obeyed and speed regulations are observed by the engineer, and to take appropriate action if they are not, under certain circumstances to act as flagman to protect the head end of the train while it is stopped. The fireman is taught and required to learn about the mechanical operation of the locomotive, and the engine,

as well as to acquaint himself with the electrical circuits and other features of the diesel-electric power plant. He is taught how to discover, and to some extent to correct, malfunctions in the operation of the locomotives, and customarily relieves the engineer at times and operates the locomotive under his supervision. No training is given the other members of the train crew with respect to the operation of the locomotive or the discovery or correction of malfunctions in its operation. When conditions permit, the fireman, or helper, answers alarms from other units of the engine consist, and makes inspections to discover malfunctions for which there are no alarms. It is argued that insofar as the lookout and signal passing functions of the fireman are concerned, the fireman contributes little, if anything, to the safety of freight operations, since the engineer needs little, if any, assistance in this respect, and in any event the head end brakeman is present in the cab to perform those functions and actually does perform them. With respect to the making of inspections and correction of mechanical or electrical malfunctions, it is asserted and has been found by the commissions heretofore referred to, that only minor malfunctions can be corrected by firemen and that in any event correction of malfunctions takes little of the fireman's time, and that the same corrections could be made by the engineer, even though he might have to stop the train to do so, or by maintenance employees, with little loss of time. The evidence also establishes that access to one locomotive from another is difficult and dangerous, when some types of locomotives are in use. With respect to the relief of the engineer, in road service, it is also asserted that in the event of an emergency created by the death or illness of the engineer, any member of the train crew riding in the cab can easily stop the train, and that in any event such occurrences are infrequent, and the possibil-

ity of their occurrence does not justify the retention of the fireman as a member of the engine crew. It is also established, however, that the engineer's tour of duty often requires many hours of work, in snow, sleet or rain, and other adverse weather conditions, and the argument that temporary relief of the engineer by the fireman contributes to safety under such conditions is at least worthy of serious consideration.

In yard service the fireman's most important function is that of a lookout, and in passing signals to the engineer when the ground crew must work on the fireman's side. In many switching operations, particularly when the locomotive is pushing cars, the engineer's view to the left is quite restricted, and he must depend on the fireman, or on signals transmitted by the ground crew, directly to him for information as to vehicles, other cars or engines, laborers or other persons on or in the vicinity of tracks, and clearances of other cars, engines or objects with relation to the movement of his locomotive, and as to objects on the tracks which might be a source of danger. It is claimed that the fireman is not necessary because the lookout function can be performed by the yard crew, and that signals can be passed directly to the engineer, at the expense only of a slight loss of time, if the trainmen are required to shift their positions to the engineer's side. During these operations the speed of the locomotive is slow and the engineer must be prepared to stop at all times. The argument is also advanced, however, that the engineer, no matter how slow the speed may be, will not stop for an obstruction which he can not see and which he does not know about, and in any event, in yard operations, the fireman is often the only person in the cab who can relieve the engineer in case of fatigue, or an emergency involving physical inability to perform his work.

The Presidential Railroad Commission recommended, and the Arbitration Board appointed pursuant to Public Law 88-108 directed, that locomotives should not be operated in yard service without a fireman unless equipped with a "dead man" control. At present, although such controls are installed in some yard engines, they are not installed in all.

The evidence establishes, and I find that in road freight service, particularly in switching operations, the head brakeman on frequent occasions is not in the cab of the locomotive, and the fireman is the only crew member in position to take and pass signals and to act as lookout on the left hand side. Moreover, in all types of service, he is the only employee in the cab who may be expected to be capable of relieving the engineer in case of fatigue or emergency.

The evidence does not establish, nor do I find that the lookout and signal passing duties of the firemen in road freight service are unsubstantial or that they can be dispensed with without some sacrifice of safety.

The law does not require the head brakeman to ride in the cab of the lead locomotive. He rides there pursuant to railroad rules, and there is nothing in the law to prevent a change in the rule. The railroads make no complaint that it is unreasonable to require the presence of two men in the locomotive cab in road freight service. Nor do they complain that a fireman is required as part of the engine crew in passenger service, in which the head brakeman does not ride in the locomotive cab. It may be that the fireman can correct only minor malfunctions. Even so, such corrections may make some contribution to safety, and if it be conceded that in yard service the ground crew can discharge the lookout and signal passing duties of the fireman, the evidence does not establish that they do so to such extent that the

fireman's services are unnecessary. Although there is room for argument, and the question may be fairly debatable, I do not find that it is unreasonable to require, as the full crew statutes do, that a second man be present in the locomotive cab, or that the second man shall have, in addition to ability to act as lookout and read and pass signals, the training and qualifications ordinarily possessed by firemen, which may make it possible for him to be of assistance to the engineer in the operation of the locomotive. Even if it be assumed that in road freight service the head brakeman is in all respects as competent as the fireman to perform and does adequately perform the duties assigned to both which are necessary in the interest of safety, it may not be held that the statutory rule is unconstitutional because the railroad rule adequately protects against the same hazards. Such a holding would subordinate the law-making power of the legislature to the rule-making power of the railroads (Cf. *Northern Pacific R. Co.* v. *Warner,* 45 N. W. 2d, 196), and, as has been stated, if compliance with both the rule and the statute involves a burdensome duplication of services, the rule may be changed.

The question remains whether it is reasonable to require three brakemen in road service on a freight train of over twenty-five cars in length and two on a train of twenty-five or less, and to require two trainmen or helpers in yard and transfer service. It is the contention of plaintiffs that they have operated and do operate freight trains safely and efficiently, of much greater length than twenty-five cars, without a third brakeman and that the third brakeman who boards the train or leaves it at the New York state line performs no useful service, and contributes nothing to safety. It is also the contention of some of the plaintiffs that second brakemen in yard and transfer service, and in road freight

service are unnecessary and contribute nothing to safety. Freight trains of more and less than twenty-five cars are handled safely, according to these plaintiffs, by a conductor and one brakeman, and switching and transfer operations are similarly handled with due regard to safety. Other plaintiffs, however, make no complaint at all as to the second brakeman and are apparently content to continue with a crew consist containing two brakemen on all assignments.

I do not find that the evidence sustains the contention that the third brakeman in road freight service performs no duties. He performs the duties assigned to him by the conductor, and these duties are no different than those performed by the other brakemen: All the brakemen perform lookout duties, particularly with respect to their own train, to discover evidence of hot boxes, trailing equipment, or other failures which may lead to derailments or other serious trouble. One brakeman customarily observes the track over which the train has passed, for evidence of trailing equipment, or defects in the track or roadbed, and has the duty of protecting the rear end of the train, when the train is stopped under such conditions that rear end protection is necessary. When an emergency stop is made, the brakemen examine both sides of the train, from front and rear, to determine the source of the trouble. When road switching is necessary, they handle switches and aid in setting out or picking up cars. At grade crossings they may be required to flag the crossings for the protection of the public or to aid in cutting and separating the train, if it is stopped so that it extends across a highway. Although the conductor is also available for these duties, he is required to do considerable paper work and to assume over-all control of the operation of his train. Brakemen are required to observe and inspect passing trains and to report any defective con-

ditions which they may observe, as well at to take and pass signals from passing trains, stations and other locations along the railroad. They also pass signals from the ground, in the process of road switching, and thus help control the movement of the train in passing objects where clearances are close, or the way is obstructed. Under modern conditions a train of twenty-five cars is approximately a quarter of a mile in length, and trains of over a mile, or of two miles, in length are not uncommon. The third brakeman rides where he is directed to ride by the conductor, usually in a trailing unit of the engine consist, or in the caboose. In either position, with a train of a mile or more in length, he has a considerable responsibility with respect to his duty to keep even one side of the train under observation, in addition to that which he is required to discharge in watching passing trains, and in passing signals. In switching operations his signal passing responsibilities often involve relaying signals to the engineer as to conditions which the engineer can not observe from the cab. Although the occasions may be infrequent, he may also be required to take the place of one of the other brakemen, who may be left behind to warn other train crews as to defective track conditions, or when his rear end flagging duties take him a considerable distance from the train, or he may be called upon to assume those duties himself. Even when his duties involve nothing more than the saving of time in getting a train under way after an unscheduled stop, the service performed may contribute to safety by helping to clear the track and thus prevent a rear end collision which might otherwise occur, or at least a reasonable argument may be made to that effect. Although no specific reason appears or has been stated in the statutes why trains over twenty-five cars in length should require the services of a third brakeman and trains of twenty-five cars

or less should not, it may also be argued reasonably that the duties of the train crew are frequently more numerous and more exacting on a long train than on a short one, and that the trainman's responsibility increases proportionately with the increase in the length of the train.

What has been said of the third brakeman applies with even greater force to the second brakeman in road freight and transfer service on trains of over twenty-five cars or of twenty-five cars or less. Indeed, no claim is made that the second brakeman is unnecessary in either road freight or yard service by the Baltimore and Ohio, the Lehigh Valley, the Long Island, or the New York, New Haven and Hartford railroads. The Boston and Maine and the New York, Chicago and St. Louis Railroads make no complaint about the second brakeman on road freight service, but they and the remaining plaintiffs claim that some second brakemen in yard service are unnecessary. Prior to the enactment of the federal arbitration statute (Public Law 88-108) existing rules and practices typically called for a crew in yard service consisting of a foreman and two helpers, the crew consist required by Section 54-c of the Railroad Law. The evidence presented establishes that activities in yard switching operations and duties to be performed are so varied that it is difficult to conclude that safety of operations requires the assignment of a specific number of trainmen on all occasions. It is probable that the problem may be better solved in each case in accordance with local conditions. However, the evidence discloses such a wide variety of duties with respect to handling switches, flagging, observation and avoidance of close clearances, obstructions and persons on tracks, and passing of signals, which will contribute to safety, in addition to other duties which contribute to the efficiency of the switching opera-

tions, that it is obvious that a safety problem exists, which is the proper subject of legislative action.

Five of the plaintiffs complain that the second brakeman on certain trains, other than freight trains, of five cars or more are unnecessary. Insofar as these trains include those which actually carry passengers, the requirement does not appear to be unreasonable. These brakemen, as in the freight service, have duties involving flagging, lookout and signal passing, and in addition are required to assist passengers in boarding and alighting from trains, as well as to protect them from disorder. With respect to the trains which do not carry passengers, it is difficult to understand why two brakemen should be necessary on trains of five or more cars, and not necessary on trains of less than five cars. Neither is it easy to understand why it should be required that a light engine, without a car or cars, should have a crew of three, consisting of an engineer, a fireman and a conductor or brakeman, or why baggagemen should be required in the interest of safety on baggage trains or passenger trains carrying baggage. However, only two of the plaintiffs claim that baggagemen are unnecessary, and no complaint is made that any member of the light engine crew is unnecessary except the fireman. It may be, although it is not clear, that the legislature believed that the assignment of baggagemen was reasonably necessary for the protection of baggage and would leave the other train crew members free to perform their safety functions, and had in mind, with respect to the crew of light engines, the necessity for lookout duty and flagging, in the event of unscheduled stops.

It is true that technological progress in railroad operations has to a great extent lightened the load of the train crews, and has eliminated many of the dangers which ex-

isted when the full crew laws were enacted. The danger of collision has been reduced by improvements in signals and automatic and central traffic control, and the use of automatic train stop equipment. Electronic detector devices and improvements in rails and roadbeds, in car construction, and in lubricating devices, have materially lessened the danger of derailment which existed thirty years ago. Nevertheless, as has been stated, trains are longer and heavier and are operated at greater speed, and in spite of the material advances and improvements in technology, collisions and derailments still occur. Improvement in radio equipment has materially lessened the danger that essential information may not be adequately conveyed to the engineer, from the rear end of freight trains, or from the ground crew in switching operations. Nevertheless, the evidence establishes that malfunctions do occur in radio equipment as well as in other safety devices. It may be that under perfect operating conditions, when nothing unusual or unexpected occurs, the danger of accident is slight. Statutes are not unreasonable, however, because they require that trains be manned for the possibility of adverse or emergency conditions which may be reasonably anticipated. The evidence does not establish that when the full crew laws were enacted they required the employment of trainmen whose services were not reasonably necessary to give protection against the dangers of railroad operations, and as was said in *Missouri Pac. Ry. Co.* v. *Norwood* (13 F. Supp. 24, 36) in answer to an argument similar to that advanced here, the dangers have only been lessened, and that lessening is not of a proportion to show that the trainmen or helper requirements are clearly unreasonable and arbitrary.

It must be conceded that the criticism leveled against the full crew laws is not without merit. They are mandatory

and inflexible and make no distinction between differences which exsist in the operation of different railroads, or in different types of operation on the same railroads. They may, as plaintiffs contend, exact needless and wasteful requirements in some cases, and it may be that some assignments may be as safely and efficiently handled with fewer employees than the laws require. But railroad operations are unquestionably a proper subject for reasonable regulation under the police power of the states (*Chicago, Burlington & Quincy R. R.* v. *Iowa,* 94 U. S. 155, 161), and it is for the legislature, and not for the courts, to balance the advantages and disadvantages, of the requirements of the statute, unless they are clearly unreasonable or not related to the legislative purpose.

Obviously greater flexibility in regulation could be attained by empowering a regulatory agency to control crew consist practices, as the Public Service Commission suggested. However, the legislature did not see fit to adopt that suggestion, and apparently was of the opinion, on the basis of facts known to it, or which could reasonably be assumed to exist, that the hazards of railroad operation not only required legislative action in the interest of safety, but that they existed to such extent that uniform regulation was required to attain the degree of safety which the legislators considered essential (Cf. *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U. S. 483). There is, of course, room for argument that the inflexible requirements of the statutes are arbitrary and unreasonable. They are no more so, however, than those of the Arkansas full crew statutes found to be constitutional by the Supreme Court of the United States, despite similar arguments against them (*Chicago, R. I. & Pac. Co.* v. *Arkansas,* 219 U. S. 453; *St. Louis I. W. & B. R. Co.* v. *Arkansas,* 240 U. S. 518, *supra*) or the statute sus-

tained by the same court in *Williamson* v. *Lee Optical of Oklahoma, Inc.* 348 U. S. 483, *supra*). The reasons which prompted the choice of remedy are not recorded but in the absence of proof to the contrary we may not assume that the legislative choice was capricious, or that with its informed acquaintance with the conditions to which the legislation was to be applied, it was not aware of facts which formed a reasonable basis for its action (*Farrington* v. *Pinckney,* 1 N. Y. 2d, 74, 88); neither may we set aside the legislative action because other and more efficient methods of solving the problem may exist, or merely because compliance with the statutes may be burdensome (Cf. *Munn* v. *Illinois,* 94 U. S. 113; *Ferguson* v. *Skrupa,* 372 U. S. 726, *supra; Standard Oil Co.* v. *Marysville,* 279 U. S. 582, *supra*). The cost of compliance with the laws is, of course, an element properly to be taken into consideration in determining whether they are arbitary and repugnant to the due process clause of the Fourteenth Amendment (*Missouri Pac. R. Co.* v. *Norwood, supra,* 283 U. S. 249, 255; *Lehigh Valley R. Co.* v. *Bd. of Utility Comm.,* 278 U. S. 24, 34) but the question in each case must be determined in the light of all the facts, and with a just regard to the advantages to be derived by the public and the expense to be incurred by the carrier (*Washington, Oregon R. & N. Co.* v. *Fairchild,* 224 U. S. 510, 529). Although it has been stated, with respect to state safety statutes affecting railroads, that neither potential bankruptcy nor engagement in interstate commerce will excuse failure to comply with their provisions, and that if the burdens which they impose are so great that the road can not be run at a profit, it can stop, whatever the misfortunes the stopping may produce (*Erie R. R. Co.* v. *Board,* 254 U. S. 394, 410, 411), those pronouncements when read in context are not in conflict with the rule announced in

Lehigh Valley R. Co. v. *Bd. of Utility Comm.* (278 U. S. 24, 34, *supra*) that danger to the public will not "justify great expenditures unreasonably burdening the railroad, when less expenditure can reasonably***avoid the danger."

The evidence presented in this case does not establish that compliance with the laws has proportionately increased the operating expenses of the railroad over those which were necessary when the laws were enacted. Over the years rates of pay have increased in the operation of railroads as they have in other industries. It does not appear, however, that it has been necessary to employ more men, either as firemen or trainmen. Firemen continued to be employed on diesel locomotives, as they were on the steam powered engines, and for all that appears to the contrary train crews were not increased. According to the evidence, at least on the New York Central, revenue ton miles per freight train are at the highest in the history of that railroad since 1921, at least, and the road operates with the lowest number of employees in its history. However, locomotive crews do include firemen, and brakemen who leave the trains at the state lines, and the railroads are obviously operating trains with a considerable number of employees whose services they would dispense with if they could. Nevertheless, the employment of firemen was required by national agreement until 1964, although brakeman, or other trainman assignments might have been materially reduced if the full crew laws were not in effect. On trial it was stipulated, subject to objections by defendants and defendants-intervenors as to relevance and materiality, that if the necessary witnesses were called they would testify that in the absence of the full crew statutes the plaintiffs, insofar as they otherwise had the right to do so, would eliminate crew assignments on

trains in New York State for which they pay at the present time per year for:

Baggagemen	$ 272,741.68
Brakemen (passenger)	286,372.36
Brakemen (through and local freight)	2,634,681.92
Firemen (light engine)	84,960.00
Firemen (through and local freight)	3,762,924.60
Firemen (yard)	4,898,981.64
Trainmen (yard)	1,504,031.80
or a total of	$13,444,694.00

It is understandable that plaintiffs can not produce more definite proof as to this element of their case, but the difficulty is that it is not possible to determine on the basis of the present proof what crew assignments plaintiffs would now be able to eliminate, in view of the determination by Arbitration Board No. 282, heretofore referred to that jobs may be eliminated, with certain exceptions, only in accordance with the principle of natural attrition. The conclusion is reasonable that in time, although not at present, the cost of compliance with these statutes may involve the expenditure of the amount estimated. However, the danger sought to be avoided by the legislation is clear, and the remedy adopted by the legislature is reasonably related to the danger, and to the legislative purpose to avoid it. Consequently, it may not be said that the legislative purpose can be reasonably accomplished by any lesser expenditure, or in any event that the cost is not within reasonable limits, at least at present. Whether the cost in the future will be so unreasonable as to justify a different determination may be better decided in the light of conditions which may exist at that time.

With respect to the first cause of action, I conclude that plaintiffs have not established that the statutes under attack deprived them of their property without due process of law when enacted, or that the dangers sought to be avoided when the statutes were enacted have lessened to such extent that the minimum crew requirements are now clearly unreasonable and arbitrary.

Neither do I find that these statutes contravene the equal protection clause of the Fourteenth Amendment, or of Article I, Section 11 of the Constitution of the State of New York. It is well established that the prohibition of the equal protection clause goes no further than the invidious discrimination (*Williamson* v. *Lee Optical of Oklahoma, Inc., supra,* 348 U. S. 483, 489). Neither our own constitution nor the equal protection clause of the Fourteenth Amendment takes from our legislature the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard. Neither is it required that every state regulatory statute apply to all in the same business or industry. Reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind (*Morey* v. *Doud,* 354 U. S. 457, 465). That the full crew laws single out the railroads from other competing forms of transportation may seem unfair, and even unwise, but there are obvious differences between railroads and other forms of transportation, both in relation to methods of operation and relations to the public, and statutes regulating railroad operations do not deny equal protection of the laws merely because they do not purport to regulate other forms of transportation (Cf. *N. Y. Central & H. R. R. Co.* v. *Williams,* 199 N. Y. 108, 123). Concededly, however, classifications must rest on some reasonable basis and it is difficult

to understand why Section 54-c should require a minimum crew in switching operations on railroads of more than fifty miles in length, and not on shorter lines, even though it is easier to justify the similar provision in Section 54-a. Presumably the hazards of road operations were considered greater on long runs than on short ones, but it would seem that the dangers inherent in switching operations are equally great on short line roads as on roads of greater length. However, when such a classification is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed (*Morey* v. *Doud, supra,* 354 U. S. 457, 464). It is, of course, quite possible, and we must therefore assume in the absence of proof to the contrary, that there were differences in the conditions under which switching operations were carried out on long and short lines in this state which reasonably justified separate treatment.

The Arkansas full crew statutes which contained similar classifications were also attacked on the ground that such classifications denied the plaintiff railroads equal protection of the laws. Commenting on the requirement that full crews be employed in Arkansas in road freight service on railroads of at least fifty miles in length, the Supreme Court said: "And the statute being applicable alike to all belonging to the same class, there is no basis for the contention that there has been a denial of the equal protection of the laws." (*Chicago, R. I. & P. R. Co.* v. *Arkansas,* 219 U. S. 453, 466). With respect to the statute requiring minimum crews in switching operations, the court said:

> "A more serious objection is that certain terminal companies, one at the City of Helena and one

> at Fort Smith, do switching for certain connecting trunk lines, and yet, by reason of their length being less than 100 miles, are not covered by the act. Indeed, it is said that one of them, that at Fort Smith, does switching over some of the same crossings that plaintiff in error does. The distinction seems arbitary if we regard only its letter, but there may have been considerations which determined it, and the record does not show the contrary. We have recognized the impossibility of legislation being all-comprehensive, and that there may be practical groupings of objects which will as a whole fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant." (*St. Louis I. M. S. R. Co.* v. *Arkansas, supra,* 240 U. S. 518, 521; see also *People* v. *New York, New Haven & Hartford R. Co.,* 142 N. Y. 646, affd. 165 U. S. 628.)

Plaintiffs' third contention, that the full crew laws are a direct interference with and burden on interstate and foreign commerce, in violation of Article I, Section 8, Clause 3 of the United States Constitution, requires litle discussion. Concededly, Congress has the power to regulate foreign and interstate commerce. But under our constitutional system there necessarily remains to the states, until Congress acts, a wide range for permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected (*Kelly* v. *Washington,* 302 U. S. 1). Undoubtedly the full crew laws affect interstate and foreign commerce. They do not regulate it, however, nor do they substantially impede its flow into or out of the state, and with respect to the contention that they con-

stitute a direct interference with, and a burden on it, the Arkansas full crew cases, heretofore refered to, appear to be controlling, unless, by the enactment of United States Public Law 88-108 in 1963, Congress entered the field of railroad regulation to such extent as to preclude action by the states with respect to train crew consists.

Answering a similar attack on the 1907 Arkansas full crew law, the Supreme Court said:

> "The statute here involved is not in any proper sense a regulation of interstate commerce * * *. Upon its face, is must be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction of such commerce, and for the protection of those engaged in such commerce.* * * Undoubtedly, Congress, in its discretion may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce. But it has not done so in respect to the number of employees to whom may be committed the actual management of interstate trains of any kind. It has not established any regulations on that subject, and until it does, the statutes of the state, not in their nature arbitrary, and which really relate to the rights and duties of all within the jurisdiction, must control. This principle has been firmly established, and is a most wholesome one under our systems of government, Federal and state." (*Chicago, R. I. & L. R. Co.* v. *Arkansas, supra,* 219 U. S. 453, 465, 466)

This holding was reaffirmed in *Missouri Pac. R. Co.* v. *Norwood, supra* (283 U. S. 249, 252) and in *Southern Pac. R. Co.* v. *Arizona,* 325 U. S. 761, the Supreme Court again reiterated its former holdings, stating (325 U. S. 782):

> "While the full train crew laws undoubtedly placed an added financial burden on the railroads in order to serve a local interest, they did not obstruct interstate transportation or seriously impede it. They had no effects outside the state beyond those of picking up and setting down the extra employees at the state boundaries; they involved no wasted use of facilities or serious impairment of transportation efficiency, which are among the factors of controlling weight here. In sustaining those laws the Court considered the restriction a minimal burden on the commerce comparable to the law requiring the licensing of engineers as a safeguard against those of reckless and intemperate habits, sustained in *Smith* v. *Alabama,* 124 U. S. 465, * * * or those afflicted with color blindness, upheld in *Nashville, C. & St. L. R. Co.* v. *Alabama,* 128 U. S. 96, * * * and other similar regulations. *New York, N. H. & H. R. Co.* v. *New York,* * * *, *supra; Atlantic Coast Line R. Co.* v. *Georgia,* * * *, *supra;* cf. *County of Mobile* v. *Kimball,* 102 U. S. 691, * * *."

Insofar as the laws' impact on foreign or interstate commerce is concerned, the full crew laws were not unconstitutional when enacted, and the evidence does not establish that when applied under present conditions they have any greater or different impact on commerce than they had at that time or, for the reason heretofore stated, that

the cost of compliance constitutes an unnecessary or unreasonable burden thereon.

The question remains whether Congress by the enactment of Public Law 88-108 in 1963 entered the field of railroad regulation to such extent as to invalidate the state full crew laws. Perhaps, with respect to the regulation of working conditions, not related to health or safety, the field had already been preempted by the provisions of the Railway Labor Act, leaving such regulation to bargaining agreements between employee and employer (See *United Air Lines Inc.* v. *Industrial Welfare Comm.*, 28 Cal. Reptr. 238, and cases cited). Such does not appear to be the case, however, with respect to laws relating to minimum requirements of health or safety, even when applied to those employees whose collective bargaining agreements are imbued with the force of federal law by virtue of the Railway Labor Act (Cf. *Missouri Pac. R. Co.* v. *Norwood*, 283 U. S. 249, supra; *United Air Lines Inc.* v. *Industrial Welfare Comm.*, 28 Cal. Reptr. 238, supra).

Protection of life, health, safety and property is a local problem and primarily the function of the states (*Bradley* v. *Public Utilities Commission*, 289 U. S. 92) and the right on the part of the states in a field not occupied by Congress to protect the life, health and safety of its people is in no way inconsistent with the purpose of the commerce clause to place in Congress supreme control over interstate commerce, since the paramount authority of Congress always enables it to intervene in its discretion (*Minnesota Rate Cases*, 230 U. S. 352; *S. Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177).

> "States are thus enabled to deal with local exigencies and to exert in the absence of conflict with

> federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulations shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" (*Kelly* v. *Washington,* 302 U. S. 1, 10, supra).

Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public, unless its purpose to do so is clearly manifested (*Reid* v. *Colorado,* 187 U. S. 137, 148) or unless the state law in terms or its practical administration conflicts with the act of Congress, or plainly and palpably infringes on its policy. (*Southern Pacific R. Co.* v. *Arizona, supra,* 325 U. S. 761-766).

In areas of the law not inherently requiring national uniformity, state statutes enacted under the police power and otherwise valid must be upheld, unless there is found such actual conflict between the two schemes of regulation that both can not stand in the same area, or evidence of Congressional design to preempt the field (*Head* v. *Bd. of Examiners,* 374 U. S. 424, 429, 430).

With respect to railroad full crew laws, the Supreme Court of the United States has said:

> "In the absence of a clearly expressed purpose so to do, Congress will not be held to have intended to prevent the exertion of the police power of the states for the regulation of the number of men to be employed in such crews." (*Missouri Pac. R. Co.* v. *Norwood,* 283 U. S. 249, 256, *supra*)

It seems obvious that the regulation of train crew consist practices does not fall within an area of the law which inherently requires national conformity, although Congress undoubtedly has the power to enact a national regulatory statute. The first question which must be decided, therefore, with respect to the issue of federal supremacy is whether the full crew laws conflict with the Act of Congress or the award made thereunder to such extent that they can not be reconciled or consistently stand together. The full crew laws, the federal statute and the award all touch the same subject. Such being the case, our primary function is to determine whether under the circumstances of this case the New York statutes stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. The nature of the power exerted by Congress, the object sought to be attained and the obligations imposed by law are all important in considering the question of whether the federal enactments preclude enforcement of the state laws (*Hines* v. *Davidowitz,* 312 U. S. 52, 66, 70).

Of course, if the language employed in the federal law is so plain unambiguous that the Congressional purpose and objectives are clear, there is no room for construction, and "a holding of federal exclusion of state law is inescap-

able and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce; * * *." (*Florida Avocado Growers* v. *Paul,* 373 U. S. 132, 142, 143.)

In the instant case it is obviously not impossible for the plaintiffs to comply with both the state full crew laws and the award of the Board of Arbitrators. Compliance with the full crew laws completely satisfies the permissive provisions of the award. The fact that such compliance is possible, however, is not conclusive. If the federal statute and award permit the operation of freight trains and locomotives in New York State with smaller crews than those required by the full crew laws, the state statutes may not be enforced. A state may not prohibit that which Congress has authorized in a field over which Congress has authority (*California* v. *Taylor,* 353 U. S. 553; *Franklin Nat. Bank* v. *New York,* 347 U. S. 373).

It must be conceded that some of the language employed in the award appears to authorize, expressly, what the state statutes forbid. The language employed, however, must be read in context, in the light of the law which created the board and the board's own explanation of its decision, as embodied in the opinion of its neutral members.

I do not belive that the language employed in the statute indicates a purpose to permit the Arbitration Board to determine that locomotives and trains may be manned, in states which had enacted full crew laws to eliminate the hazards of railway operations within their own borders, with smaller crews than those prescribed by such laws. Certainly, if there is such a purpose, it is not clearly expressed. On the contrary, both the language employed and the legislative history of the statute appear to evidence an intent not to interfere,

in any way, with the operation of the state laws. Neither does the award of the arbitrators, when read in the light of its expressed purpose, evidence an intent to permit locomotives and trains to be manned in violations of state statutes. Unquestionably, as has been stated, the public law and the award made thereunder are part of the law of the land. We may not read into them, however, provisions which they do not contain, or purposes which were not intended. Like other laws, they must be interpreted so as to give effect to the Congressional intent so far as that intention may be effected within the bounds imposed by a fair reading of the legislation, and the award made thereunder.

The public law is what it purports to be. As stated in its preamble, it is emergency legislation. It was designed to provide for the settlement of the existing labor dispute between "certain carriers by railroad and certain of their employees" and thus to avoid a threatened nationwide strike. That dispute did not involve any question concerning the operation or enforcement of the state full crew laws. No labor organization had threatened to strike, nor had any railroad threatened a lockout if the full crew laws should not be modified or repealed. Their existence created no emergency. If the employees' organizations had accepted the proposals contained in the notices served by the railroads, or if the railroads had accepted the proposals made by the organizations, there would have been no emergency, and no strike, and the full crew laws would not, in my opinion, have been affected in any way. The dispute which brought on the crisis which resulted in the emergency legislation involved only proposals to eliminate old rules, which existed by agreement or by reason of practices established by custom, and to establish new rules relating to the manning of locomotives and trains in road freight and yard and

transfer services. It was this dispute, and nothing more, which was submitted to the Arbitration Board for determination. The parties to the dispute were free to decide it by agreement, if they could do so. If not, the arbitrators were to make a decision only as to the disposition of those portions of the carriers' notices identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the Organizations' notices identified as "Minimum Safe Crew Consist", and implementing proposals pertaining thereto. The arbitrators were required to incorporate in their decision any matters on which they found the parties in agreement, and their award was to be "binding on both the carrier and organization parties to the dispute", and constitute a complete and final disposition of the "issues covered by the decision of the board of arbitration." Both from the language employed and the available evidence of Congressional intent, the purpose of the Public Law seems clear. Congress was not concerned with the elimination of impediments to the flow of commerce across state lines, the removal of conditions that threatened the health or safety of workers, or the regulation of working conditions in the interest of railroad employees. The parties to the dispute were free to settle it by their own agreement if they could, and the resulting conditions could be as good, or as bad, insofar as safety and working conditions were concerned as the parties should choose to make them. What Congress was concerned with was the settlement of a dispute, in the interest of the national welfare, which the parties had been unable to settle by negotiation and agreement, and it seems clear that Congress did not intend to enter the crew consist field to any greater extent than was necessary to accomplish that purpose. The objectives were to be achieved, as

stated in the preamble to the joint resolution, in a manner which "preserves and prefers solutions reached through collective bargaining, * * *." Presumably, for that purpose, and to encourage further bargaining to bring about a permanent solution of the problem, if possible, by agreement, the public law further provided that the relief to be obtained through arbitration should be effective for a limited time. The award was to continue in force for a period not to exceed two years, unless the parties should otherwise agree.

That Congress did not contemplate that the full crew laws should be affected seems evident from the provisions of the statute. The fact that the dispute was to be settled by agreement, if possible, does not appear to be consistent with a purpose to supersede the state laws. It does not seem likely that Congress intended that laws enacted under the constitutionally protected police powers of the states might be set aside by agreement between the railroads and their employees. There is, of course, ample authority which establishes that collective bargaining agreements made pursuant to federal law bear "the imprimatur of the federal law upon them," and cannot be vitiated or made illegal by state laws. (See *Railway Employees' Dept.* v. *Hanson,* 351 U. S. 225; *California* v. *Taylor,* 353 U. S. 553; *supra; Local 24 of the International Brotherhood of Teamsters* v. *Oliver,* 358 U. S. 283.)

No case has been cited, or discovered, however, which applies that principle against state laws relating to minimum requirements of health or safety, nor do I believe that it may properly be so applied, in the absence of a clearly stated Congressional purpose to effect such a result. Indeed, in the *Oliver* case (358 U. S. 283, *supra*) in sustaining a collective bargaining agreement prescribing a wage scale for truck drivers, as against a state statute, the court said:

> "We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce." (p. 297) (See also *Missouri Pac. R. Co.* v. *Norwood,* 283 U. S. 249, *supra.*)

Neither does the fact that the award will provide only interim relief, unless the parties shall agree that it shall remain in force for more than two years, appear to be consistent with an intent to displace the state laws. That provision of the law does not preclude a determination of federal preemption or supremacy, but it seems unlikely that Congress intended to give relief from the state statutes for such a limited period, during which the railroads could obtain little or no relief even if the award should be favorable to them and to subject them to the same restrictions thereafter. As I read the statute, and the award, that is the result that must follow, if it is held that the state laws are superseded. I am unable to agree that it was intended that the award of the arbitrators might have the effect of permanently wiping out the state laws, or precluding state action after the effective life of the award. Moreover, if Congress intended to have the arbitrators decide matters which were not in issue and to provide for a permanent method of settling future disputes, it seems unlikely that Congress would not have entered the railroad crew consist field completely. Whatever the effect of the public law and the arbitration award may be, they can not affect the full crew laws insofar as they provide for the employment of firemen on diesel-electric locomotives in the passenger service. No such question was included in the dispute or submitted for arbitration. Insofar

as discussions in Congress, and Committee reports indicate Congressional intent, the evidence is not conclusive, but it does not indicate any purpose other than to solve the pending dispute, or any intent to supersede state laws.

In recommending the passage of the Joint Resolution, The Committee on Commerce, in the Senate, referred to the resolution as one designed to resolve the current dispute, and stated that it was not, and could not conceivably be considered as a precedent for any other labor management dispute. It was, the Committee stated, "what it purports to be—a one shot solution through legislative means to a situation which imperiled, beyond question the economy and security of the entire nation." In the House of Representatives, during the discussion of the proposed resolution, there appeared to be considerable doubt as to the effect its adoption would have on the state full crew statutes, but in reporting thereon and recommending its passage the Committee on Interstate and Foreign Commerce gave assurance that: "The committee does not intend that any award made under this section may supersede or modify any state law relating to the manning of trains." The section referred to was Section 3, which relates to the determination to be made by the arbitrators.

The award, like the public law, is of limited application. It stands, as it was intended to, as a binding determination, of the dispute which existed, between the "carrier and organization parties to the dispute." In it the Board makes a "complete and final disposition of the issues submitted". which involved, as has been stated, only proposals contained in the notices served by the carriers and the organizations, which concerned rules established by agreement or practice, and did not indicate any purpose to affect state laws providing for the manning of locomotives or trains. It does not

purport to nor does it dispose of any issues, other than those submitted.

Although the award of the Board contains language which appears to permit the railroads to dispense with the use of firemen in road freight and yard and transfer services, such as the provision that after thirty-seven days following the effective date of the award the carrier shall not be required to use firemen (helpers) except as provided in the award, it is apparent that the Board was dealing with the requirements or rules and practices established by agreement and custom, and not with the requirements of the full crew laws. That this was the intent of the award is made clear in the explanatory opinion of the neutral members, in which they say:

> "On its face this procedure would seem to permit the individual carriers immediately to stop assigning firemen on ninety per cent of the freight engine crews and yard engine crews which they listed initially. That it will not have such an effect is due to three reasons. First, * * *. Second, a number of States, by law or administrative regulation, require the use of firemen in road freight or yard service. * * *".

The crew consist issue (other than engine service) was referred by the arbitrators to local properties for negotiation. If the parties to the disputes could agree, that would be the end of their dispute. As previously indicated, any such agreement could hardly have been intended to supersede state full crew laws. If negotiation should not prove effective the disputes, limited to the application of guide lines enumerated in the award, insofar as they might relate to the

issues were referred to special boards of adjustment for determination. No change was to be made in the scope or application of rules in effect, except by agreement, or pursuant to the procedure provided by the award.

The policy of the special boards with respect to possible conflict with full crew laws has not been uniform. Some, however, have made determinations which appear to authorize the carriers concerned to operate freight trains with crews smaller than those permitted under the full crew laws, although the boards have not attempted to resolve the question of conflict between those statutes and their determinations. Again the issues submitted to them involved only rules, agreements and practices. The Arbitration Board, in providing for special boards of adjustment, did not limit their activities to the determination of disputes in states which had no full crew laws. They could hardly have intended, however, to give to those boards powers which they did not have themselves. With respect to their own jurisdictional limitations, they had stated:

> "Both of the issues before us concern manning and the effect on manning of technological progress and change. In view of the present national concern with such questions—with problems of automation and unemployment—the limitations under which we must deal with these issues should immediately be made clear. We are an arbitration board, established to settle two particular points of controversy in a specific labor dispute. Though our authority comes from Congress, the issues we must decide were framed by the parties, and the scope of our action cannot exceed the scope of the actions which the parties themselves might have taken with respect

> to these issues had they been able to reach agreement. There are many questions of general social policy, community action, or legislation which bear on the problems before us, but they are not within our purview."

I do not find that the state laws enacted to regulate railroad operations in the interest of safety stand as an obstacle to the accomplishment of the full purpose and objectives of Congress to settle the pending labor dispute, and thus avert a nationwide strike, and to prevent strikes or lockouts over any dispute involving the issues arbitrated for at least two years. Neither do I find any conflict between the state laws and the federal statute and the award, interpreted in accordance with the Congressional purpose which requires the conclusion that the state laws have been superseded, nor does it appear that there is any policy expressed in the federal act on which the state laws impinge. Such being the case, it follows that the state laws have not been superseded "unless that was the clear and manifest purpose of Congress." *Florida Avocado Growers* v. *Paul,* 373 U. S. 132-146, *supra; Missouri Pac. Ry. Co.* v. *Norwood,* 283 U. S. 249, 256, *supra; Reid* v. *Colorado,* 187 U. S. 137, 148, *supra.*

I find no such purpose in the federal act, nor in the award or the determinations of the special boards. It must be conceded that the question is not free from doubt, in view of the determination recently made in *Chicago, Rock Island and Pacific R. Co. et al.* v. *Hardin,* by the Federal District Court in the Western District of Arkansas, in which a three judge court came to the conclusion, although not unanimously, that the Arkansas Full Crew Laws heretofore referred to are in substantial conflict with Public Law

88-108. This court must, and does, give due and great respect to the construction by a Federal Court of a Federal Statute, but we are not strictly bound in such matters by any but the United States Supreme Court decisions (*Peo. ex rel Ray* v. *Martin*, 294 N. Y. 61, 73, affd. 326 U. S. 496). In the instant case, for the reasons hereinbefore stated and those stated in the dissenting opinion in the Federal Court, I am constrained to disagree respectfully with the conclusions expressed by the majority members of that court. In view of the determination made it is unnecessary to discuss or pass upon the defenses interposed or the motions made to dismiss the plaintiffs' fourth cause of action.

The defendants and the intervenors-defendants are entitled to judgment dismissing the complaint, and judgment is directed to be entered accordingly, with one bill of costs to the defendant Attorney General and the two defendants-intervenors.

Requests to find submitted by the defendant Attorney General are denied except insofar as the facts requested to be found have been hereinbefore stated.

White Plains, New York
April 8, 1965

G. N.
GERALD NOLAN
J. S. C.

Order of Appellate Division, Second Department

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 29, 1967.

HON. GEORGE J. BELDOCK, *Presiding Justice.*

HON. MARCUS G. CHRIST,
HON. SAMUEL RABIN,
HON. A. DAVID BENJAMIN,
HON. FRED J. MUNDER, *Justices.*

THE NEW YORK CENTRAL RAILROAD COMPANY, *et al.*,
Appellants,

v.

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, *et al.*,
Respondents.

In the above entitled cause, the above named The New York Central Railroad Company, et al., plaintiffs, having appealed to this Court from parts of a judgment of the Supreme Court, Westchester County, dated April 20, 1965; the said appeal having been argued by William P. Rogers, Esq., of counsel for appellants, by Joseph A. Romano, Esq., of counsel for respondent Louis J. Lefkowitz, etc., et al., and by Thomas A. Shaw, Jr., Esq., of counsel for respondents Brotherhood of Locomotive Firemen and Enginemen and Order of Railway Conductors and Brakemen; due deliberation having been had on said appeal, and upon this

Order of Appellate Division, Second Department

Court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment is hereby modified, on the law, by (1) amending the first decretal paragraph, which directs dismissal of the complaint, so as to except therefrom so much of the complaint as pertains to section 54-b of the Railroad Law, and (2) adding a provision in favor of defendants, declaring that said section is constitutional and, as so modified, said judgment, insofar as appealed from is hereby unanimously affirmed, with costs to each respondent or respondents who filed separate briefs.

The findings of fact of the Supreme Court, Westchester County, are hereby affirmed.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

Opinion and Order of Court of Appeals

Court of Appeals

STATE OF NEW YORK

THE NEW YORK CENTRAL RAILROAD COMPANY; ERIE-LACKAWANNA RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE LONG ISLAND RAIL ROAD COMPANY; THE BALTIMORE AND OHIO RAILROAD COMPANY; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor; LEHIGH VALLEY RAILROAD COMPANY; BOSTON AND MAINE RAILROAD; THE DELAWARE AND HUDSON RAILROAD CORPORATION; and THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Plaintiffs,

—against—

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York; and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; and LEONARD RUBENFELD, as District Attorney of Westchester County,

Defendants,

—and—

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN,

Defendants-Intervenors.

BERGAN, J. This action was commenced in 1961 by the 10 major railroads operating in New York seeking a judgment declaring invalid on constitutional grounds the full crew laws then in effect (Railroad Law, §§ 54-a, 54-b and 54-c) and enjoining their enforcement. In a trial at Special Term commencing in October, 1964, there was a comprehensive factual examination into the reasonableness of the effect of the full crew laws on the operation of plaintiffs' railroads under modern technological conditions and operational procedures.

The trial occupied almost four months; 110 witnesses were heard and there were, in addition, tens of thousands of pages of exhibits received in evidence. The court in a careful opinion (46 Misc 2d 68) directed the complaint be dismissed and judgment accordingly was entered in April, 1965.

While the appeal taken by plaintiffs to the Appellate Division in May, 1965 was pending, the Legislature repealed two of the three full crew statutes (§§ 54-a and 54-c) and this was approved by the Governor on June 27, 1966. The Legislature refused to repeal section 54-b, although the Public Service Commission, one of the defendants in the action, had suggested the repeal of all the statutory full crew provisions.

Accordingly, when the appeal was argued at the Appellate Division, the only remaining issue was the validity of section 54-b. The Appellate Division affirmed the findings of the Special Term but, modifying on a procedural point explicitly to declare section 54-b constitutional, otherwise affirmed on the opinion at Special Term.

Although two of the three sections encompassing the full crew policy of the State, as challenged in this action, have now been repealed, it seems useful to examine their relationship with section 54-b to help understand the purpose of a manifestly deliberate legislative determination to continue in effect that section. The Assembly rejected by a vote of 120 to 20 an amendment to include section 54-b in the repeal. This decision was made against the argument both of the railroads and the conclusions of some other agencies that conforming with its requirements serves no useful public purpose under present-day operational procedures.

Section 54-a was the original full crew law. It was enacted in 1913 (L. 1913, ch. 146; amd. L. 1921, ch. 290) and provided among other things that a freight train of more than 25 cars be "manned with a crew of not less than one engineer, one fireman, one conductor and three brakemen". Section 54-c, enacted in 1937 (L. 1937, ch. 903), provided in switching or transfer operations trains be operated with a crew of "not less than one engineer, one fireman or helper, one conductor or foreman and two trainmen or two helpers".

Section 54-b, the statute now in issue, was enacted in 1936 (L. 1936, ch. 777) and is addressed to the then growing use of diesel engines to replace steam engines. It provides that every diesel engine ("fuel-electric engine") must be "manned with a crew" of not less than "one engineer and one fireman or helper".

Plaintiffs do not argue that the engineer should be alone in the diesel engine of either a passenger or freight train. They concede there ought to be an additional man there as a helper and admit to be valid the general thrust of the statute requiring this. But they say their operational rules and uniform practice in present-day, over-the-road freight operation is to place a qualified helper, a "front-end brakeman" in the engine.

This, plaintiffs suggest, adequately meets the statutory requirement for the presence of a "fireman or helper" in freight operations, since the term "fireman" derived from the laws relating to steam engines (e.g., former, § 54-a) had no literal application to diesel engines.

Consistently with this argument they concede that in passenger trains where the front-end brakeman does not ride in the engine cab, there must be a helper specially assigned for the engineer and that in this effect on passenger train operation the statute is valid.

In order to come to grips with the suggestion of plaintiffs that the statute is unconstitutional it is necessary preliminarily to decide two things: (a) whether section 54-b must be read as requiring the assignment of an additional engine crewman to help the engineer, and that this is not sufficiently met by the assignment of a front-end brakeman from the train crew; (b) if the statute is construed to require the helper to be a member of an engine crew, whether the requirement is rationally based in the promotion of safety. The opinion of the Special Term must be read as finding affirmatively on both aspects; and, if this is right, the statute is unexceptionable on constitutional grounds.

Some help in deducing what the Legislature intended in 1936 by the expression "and one fireman or helper" is obtainable both by reading section 54-a as it then existed and by reading the closely contemporaneous enactment in 1937 of section 54-c. The older section (54-a), in effect in 1936 when 54-b was enacted and addressed to steam operations, used the expression as to freight trains of more than 25 cars: "one engineer, one fireman, one conductor and the three brakemen".

It was easy to draft this because the positions had well-recognized names developed in railroad usage over many years. It was obvious and inherent in the very names used that the crew on the steam engine consists of engineer and fireman, jobs only related to the engine; and the other places of conductor and brakeman are only related to the train.

But, of course, a "fireman" on a diesel engine is a misnomer. There is no fire and no use for a "fire" man. Diesel engines in 1936 seemingly had not had time to develop a special identifying name for an engine crew member addi-

tional to the engineer and have not yet done so. If the purpose was to require an additional man on the engine, the safe approach for the draftsman was to use a term which, although not technically and exactly consistent with diesel operations, had come, by long usage in union, management, and operational relations in railroads, to be well understood and the subject of statutes, regulations and contracts.

Thus, a careful draftsman might use "fireman" but would give free scope to the statute by adding "or helper". When that was written in 1936, of course, it had to be read with 54-a as to the rest of the operational crew. Thus, read together after the 1936 enactment and when related to a long freight train pulled by diesel power, the total crew would be "one engineer and one fireman or helper" and also be "one conductor and three brakemen". This language suggests as to the train crew the continuance of a separate entity from the engine crew and the same kind of distinction between the two which had resulted from the earlier differences in the 1913 statute expressed in well-understood job terms.

The 1937 enactment of section 54-c is not conclusive on what the Legislature had in mind in 1936, but it is closely enough related in time and subject matter to throw some light on the legislative belief or disbelief that the crews were being kept intact and separate in the legislative scheme. And it indicates rather reliably what the Legislature meant by "or helper" the year before.

The 1937 statute, as it has been seen, dealt with switching or transfer operations. It described all the crew required in such operations and it affected steam locomotives and diesel engines alike. There must be "one engineer, one fireman or helper, one conductor or foreman, and two trainmen or two helpers". It is difficult to read this in a sense

other than to mean that the "or helper" following "fireman" related to a specially assigned engine assistant; and the "or helpers" following the plural "two trainmen" related to the train crew. It is reasonable to think that, as used in 1936 in 54-b, the term "one fireman or helper" did not envisage and would not be satisfied by, the presence in the engine of one of the brakemen who were separately required to be provided for the train.

This is the way the court at Special Term read section 54-b. The opinion noted the words "fireman or helper" were "used to designate the second man in the engine crew * * *. The statutes do not specify what those duties are but in the absence thereof the requirement could only have been intended to mean such duties as were generally associated with the position of fireman, or helper, as the second man in the engine crew was sometimes referred to on locomotives such as the diesel-electric, on which the work of firing the boiler was not required to be performed." (NOLAN, J., 46 Misc 2d 68, 84.) The court underpinned this construction of the statute on inferences derived from the massive record on which the judgment was based.

Indeed, this is the sense in which plaintiffs themselves pleaded the statute was commonly construed by public authority. The complaint alleged, as part of the factual basis to establish unconstitutionality, that the "effect of said laws" was to "compel plaintiffs to employ unnecessary firemen". Plaintiffs argue in this court that the statute should be construed to permit the assignment of a brakeman to the engine. Addressing themselves to the conclusion of the Special Term that the statute requires the presence of a fireman or his equivalent in an engine crew, plaintiffs say the "statutory rule" that "the fireman must be in the cab and have the qualifications of an engineer comes

from the trial court, not the Legislature. * * * There is no basis for the trial court's defining the undefined term 'helper' to require a person having 'the training and qualifications ordinarily possessed by firemen' in the cab of the locomotive and to exclude all other members of a three- or four-man crew who are equally available and qualified to help the engineer."

But the main thrust of plaintiffs' constitutional argument, and indeed, the basic allegation of the complaint, is that plaintiffs are placed by section 54-b under just such a compulsion. The argument thus made requires this court, as it did the court at Special Term, to construe the statute.

In 1959 the Legislature by concurrent resolution of both houses directed the Public Service Commission to investigate the operation of the full crew statutes, including their relationship to the safety of railroads, and to report its findings and recommendations to the Gover or and the Legislature (Concurrent Resolution 134, approved March 25, 1959).

The commission in its report (Jan. 26, 1960) recommended the repeal of all three sections. It has been seen that six years later the Legislature followed this recommendation in part and rejected it in part. But it is significant on the construction to be given section 54-b that the Public Service Commission in its extensive examination into the full crew laws construed that section exactly as the Special Term construed it in this action—that the Legislature intended to require a fireman or the engine-crew equivalent of a fireman in the diesel engine.

The report of the commission stated: "Although the 1936 enactment, adding section 54-b to the Railroad Law, prescribed a minimum 'full crew' (not less than one engineer and one fireman) for all fuel-electric engines, its ob-

jective appears to have been to insure the [illegible] employment of a fireman on diesel-electric locomo[illegible]ne use of which in place of steam locomotives had then commenced upon a minor scale in this State" (Report, N. Y. Legis. Doc., 1960, No. 2, p. 6).

A few paragraphs later the report continued (*id.*, pp. 8-9): "[A]lthough the laws in question literally prescribed minimum 'full crews' for * * * engines * * * they were intended and designed mainly to insure the employment of * * * a fireman on diesel locomotives replacing steam locomotives". The commission added that "the full crew laws constitute rigid, inflexible requirements of statewide application regardless of the widely-varying conditions and circumstances under which railroad operations are conducted" (*id.*, p. 9).

There cannot be the slightest doubt that this regulatory commission, knowledgable in railroad problems and with the history and development of statutes and public regulations affecting railroads in mind, construed section 54-b as mandating the assignment of a type of "fireman" in diesel engines, a mandate which would not be satisfied by the presence of a brakeman. Although the plaintiffs argue, as it has been noted, that the statute is, by its terms and reasonable intent, met by the assignment of a brakeman to the engine, the construction given the statute by Special Term seems the right reading of its language.

If it be held that section 54-b requires an engine crewman fireman-type assistant to the engineer, the question then is whether it is a constitutionally valid requirement. If it serves some rational purpose to promote safety it would lie within the competence of the Legislature; if it be a hollow device to shelter locomotive firemen from the economic consequences of diesel engine technology and of

no useful purpose in the operation of the equipment, the railroads ought not be compelled to conform to it.

Its effect may not be quite as expensive as the railroads say it is. Defendants and intervenors argue that the railroads' cost claims are not factually supported and are too high; but no one could deny that if the statute is enforced, as now construed, it adds substantial costs to freight operations.

Were its only effect what the Public Service Commission regarded as its main purpose—to "insure the employment" of a "fireman on diesel locomotives replacing steam locomotives"—the validity of the statute would be open to doubt. But there is a difference between purpose and effect and the commission did not suggest job making was the only effect or, for that matter, only purpose of the statute. It used the adverb "mainly" as to purpose; nor is the commission's view on the reason for the 1936 statute necessarily the right one. Governor Lehman's memorandum of approval stated its purpose was "to protect human life" (Public Papers of Governor Lehman, p. 494).

As Governor Rockefeller noted when he signed the statute repealing 54-a and 54-c, the amendment leaves "in effect only the requirement * * * for an engineer and a fireman or helper on every fuel electric engine". The bills then being approved, he added, were "developed through intensive negotiations among my staff and representatives of the Railroad Brotherhoods and the railroads". It seems reasonable to think that a legislative compromise between economic interests underlay the deliberate decision to continue section 54-b.

Both in their pleading and in their argument here plaintiffs place reliance on the Report of the Public Service Commission to the Governor and Legislature recommend-

ing repeal of all the full crew laws. They argue: "The trial court's finding that a reasonable legislative purpose still exists for requiring firemen on all freight and yard locomotives throughout the entire State of New York conflicts with the conclusions of all tribunals which have passed upon the question". Among these is the commission.

The Special Term and the commission were, of course, addressing themselves to rather different problems. The commission was reporting on the policy question—whether the legislation should be repealed; the court was deciding the question whether it was constitutional.

When the report of the commission is read closely it will be observed that, although it said a good many things, it did not say that firemen or their engine crew equivalents should not be required by the State to serve on diesel engines in freight service. The main criticism of the statute by the commission was its inflexibility, i.e., "these fundamental faults and weaknesses of rigid, inflexible minimum crew requirements having general application" (Report, *op. cit.*, p. 54).

The commission recommended that if the Legislature gave it the power to regulate the composition of train crews it would work out better than any statutory prescription. Rather than do this by a statute, the commission felt that the "judgment of railroad management" should be subjected "to the supervening regulatory control of an agency such as this Commission" and that railroad management should not "be left completely free [of State control] to exercise its own judgment" (*id.*, p. 56). The commission proposed that it could do this, better than a general statute, by "rule, regulation or order".

But such devices, when they get to be promulgated by regulatory commissions, look and operate very much

like general statutes. The commission can get closer to operations than the Legislature and thus seem to afford flexibility, but it cannot make a rule for each train as it goes out and if it dealt with the subject of who besides the engineer should be in the engine, it could not escape doing so by some generalization.

The commission was reticent about just what kind of a "rule, regulation or order" it might deem a desirable substitute for the rigidity of the statute. It said: "For the same reasons which prompt us to condemn general statutory enactments on the subjects, we feel that it would be most improper for us to make any general findings in this report upon these controverted questions. * * * Likewise, we feel that it would be equally improper for us to endeavor to specify in this report any prospective or potential rule, regulation or order we might adopt governing minimum crews, since if the full crew laws are repealed, as we advocate, any such rule, regulation or order would have to be promulgated under the procedures provided for in subdivision 2 of Section 49 of the Public Service Law, i.e., based upon findings supported by substantial evidence pertaining to the situation or situations involved" (*id.*, p. 57).

Thus, the commission felt the statute was too rigid; that it could itself perform the regulatory function with more flexibility; but it declined to tell the Legislature how the specific merits of any of the particular objections the railroads were asserting should be dealt with. Nor does its report and recommendations afford much guidance to a court seeking an answer to the question of constitutionality.

Therefore, the plaintiffs' reliance in their complaint on the rationale of the commission, noting the lack of relationship between the "statutory full crew requirements" and "safety", must be seen in the context of the recom-

mendation in the report that commission rules would work better than the statute, and this neither supports the declaration and injunction sought nor is it helpful to a court in reaching the constitutional issue.

A very large part of the formidable record developed at Special Term was concerned with this question of the relationship between a requirement to have an engine crew helper with the engineer and safety of operation. The problem, as the court posed it, was whether this requirement was unreasonable in 1936, "and if not, whether that requirement is unreasonable under present conditions, or at least whether the question of reasonableness is fairly debatable so as to preclude its determination by the courts" (46 Misc 2d, p. 84).

The court then made a series of statements which are to be read as factual findings or conclusions drawn from the record, dealing with technological improvements in the operation of freight trains and the continuing need, notwithstanding these improvements, of the firemen or helper in the engine (see 46 Misc 2d, pp. 84-87).

Drawing this factual analysis together, the court noted that the evidence established, and it was found, that in road freight service, particularly in switching operations, "the head brakeman on frequent occasions is not in the cab of the locomotive, and the fireman is the only crew member in position to take and pass signals and to act as lookout on the left-hand side. Moreover, in all types of service, he is the only employee in the cab who may be expected to be capable of relieving the engineer in case of fatigue or emergency." (*Id.*, p. 87.)

From this, the corollary finding was made, drawn in negative terms, that the "evidence does not establish" that "the lookout and signal-passing duties of the firemen in

road freight service are unsubstantial or that they can be dispensed with without some sacrifice of safety" (*id.*, p. 87). The conclusion from all this was: "Although there is room for argument, and the question may be fairly debatable, I do not find that it is unreasonable to require, as the full crew statutes do, that a second man be present in the locomotive cab, or that the second man shall have, in addition to ability to act as lookout and read and pass signals, the training and qualifications ordinarily possessed by firemen, which may make it possible for him to be of assistance to the engineer in the operation of the locomotive" (*id.*, pp. 87-88).

Plaintiffs argue that these factual conclusions drawn at Special Term are not supported and that on an impressive mass of data, reports, opinions and operational experience, the inference ought to have been made that section 54-b, as construed by the court, adds nothing to the safety of the railroads. Much of this is an argument for different fact-finding.

The respondents and intervenors argue not only that the conclusions of the Special Term are sustained fully by the record but that the burden of plaintiffs to establish unconstitutionality of the statute, more exacting than the usual fact-finding issue in civil controversy, to overcome the strong presumption of statutory constitutionality has not been met (*Matter of Van Berkel* v. *Power,* 16 N Y 2d 37, 40; *Wiggins* v. *Town of Somers,* 4 N Y 2d 215, 218-219; *Matter of Spielvogel* v. *Ford,* 1 N Y 2d 558, 562).

The evidence is of sufficient legal effect to permit the Special Term to reach, and the Appellate Division to affirm, the essential factual conclusion on which the decision for defendants is based.

If, therefore, there be a relation between the present requirement of section 54-b and safety, as it has been found, the full crew regulation by the New York Legislature is constitutional and, in the absence of Federal pre-emption, a valid exercise of the State's police power (*Chicago, R. I. & P. Ry. Co.* v. *Arkansas,* 219 U. S. 453, 466; *St. Louis & Iron Mountain Ry.* v. *Arkansas,* 240 U. S. 518; *Missouri Pac. R. R. Co.* v. *Norwood,* 283 U. S. 249, 809; 13 F. Supp. 24, affd. 290 U. S. 600; *Engineers* v. *Chicago R. I. & P. R. R. Co.,* 382 U. S. 423). This field has not been federally pre-empted (*Engineers* v. *Chicago, R. I. & P. R. R. Co.,* 382 U. S. 423, *supra*).

The precise question now here, asserted on substantially the same constitutional arguments by plaintiff New York Central Railroad, was addressed to the Indiana full crew law of 1937 in the Indiana Supreme Court in *Public Serv. Comm.* v. *New York Cent. R. R. Co.* (216 N. E. 2d 716 [1966], cert. den. 385 U. S. 843). The court held the asserted technological advances in railroad operations since 1937 were insufficient to require invalidation of the statute in its present application and that the Indiana statute was not in violation of the due process clauses of the United States or State Constitutions or of the equal protection or Federal commerce clauses.

An Ohio decision (*Akron, Canton & Youngstown R. R. Co.* v. *Public Utilities Comm. of Ohio,* 9 Ohio Misc. 183, 193 [1967]) deals in particular with the diesel engine-fireman problem and holds the statute of that State making a requirement similar to section 54-b is valid. The court observed that the dangers sought to be avoided when the statute was enacted have not "lessened to such an extent that the minimum crew requirements are now clearly unreasonable and arbitrary". This very closely parallels the

reasoning in this present case by the court at Special Term.

Nor does the decision of the United States District Court in Arkansas in 1967 the other way (*Chicago, R. I. & P. R. R. Co.* v. *Hardin,* 274 F. Supp. 294) require the decision of the Special Term be reversed. The Arkansas case turned on different fact-finding: "We find from the evidence as a whole that under present conditions continued enforcement of the statutes makes no significant contribution to railroad safety" (p. 303). This view of the facts of that record is merely different from the Special Term's view of this record. It certainly does not follow that the New York court is neccessarily wrong about its view.

Thus, the argument of plaintiffs that the statute as now applied deprives them of due process and is confiscatory is not sustained by the record and by the findings. (See, e.g., *Seagram & Sons* v. *Hostetter,* 384 U. S. 35; *Central Sav. Bank* v. *City of New York,* 280 N. Y. 9.)

Plaintiffs do not establish on the record that the statute denies them equal protection of the laws. Differences in the impact of statutes depend for validity on the rationality of the differences (*Morey* v. *Doud,* 354 U. S. 457, 465) and some differences applying specifically to railroads have been sustained by this court (*New York Cent. & H. R. R. R. Co. v. Williams,* 199 N. Y. 108, 123). The equal protection argument was advanced in similar context without effect in *Missouri Pac. R. R. Co.* v. *Norwood* (283 U. S. 249, 252, *supra*). Nor is the statute a burden on interstate commerce (*Chicago, R. I. & P. Ry. Co.* v. *Arkansas,* 219 U. S. 453, *supra*), a case which also deals with the equal protection problem.

The order should be affirmed, with costs.

BREITEL, J. (dissenting). The issue is made eminently clear in the lucid opinion for the majority. It is whether the

statutory requirement for a separate engineer assistant in the engine crew, as distinguished from the train crew, is supported on any rational evidentiary basis as revelant to safety. Thus, the majority recognizes that "if it be a hollow device to shelter locomotive firemen from the economic consequences of diesel engine technology and of no useful purpose in the operation of the equipment, the railroads ought not be compelled to conform to it." Indeed, it is quite impossible to ignore the repeal of sections 54-a and 54-c of the Railroad Law, at the same time that section 54-b was retained, other than as an economic compromise presented to the railroads and the railroad brotherhood. The deliberate decision of the Legislature in 1966 not to repeal the diesel engine crew requirement, although it repealed other full crew statutes, may not be considered an isolated event. It is a part of the long-past and continuing economic bargaining and accommodation, legislatively mediated between railroads and labor.

Some 50 years ago, and also some 35 years ago, under quite different conditions, the Supreme Court, presented with issues concerning the constitutionally of Arkansas statutes identical in effect with that in this case, sustained the statutes as constitutional (*Chicago, R. I. & P. Ry. Co.* v. *Arkansas,* 219 U. S. 453; *Missouri Pac. R. R. Co.* v. *Norwood,* 283 U. S. 249; see *Engineers* v. *Chicago, R. I. & P. R. R. Co.,* 382 U. S. 423, 426-427). Modern conditions have changed the attitude of the Supreme Court towards full crew legislation. Thus, in *Engineers* v. *Chicago, R. I. & P. R. R. Co.* (*supra,* pp. 429-432), that court discussed changing technological conditions in the railroad industry and the associated history of economic bargaining and compromise. This court does as much too (see the majority opinion, pp. 11-12). The Supreme Court upheld the convening of a three-Judge District Court to decide anew the

constitutionality of the Arkansas statute, which court, then struck it down as unconstitutional (*Chicago, R. I. & P. R. R. Co.* v. *Hardin,* 274 F. Supp. 294).

As the entire court agrees, the constitutional basis for the full crew laws lies in the exercise of the police power to protect the public safety and not in the making of economic adjustments between railroads and railroad labor. Certainly, that has been the only basis proferred to support the full crew laws.

The evidence amply supports, and the railroads do not contend otherwise, that the presence of an assistant to the engineer, however termed or titled, in the engine cab is justified at all times, except when occasions require that he fulfill his functions as assistant by signaling from the ground, as in yard service. That is not the issue in the case. The issue is whether safety requires that such an assistant be assigned to the engine crew, separate from the train crew.[1] The argument that brakemen on the train crew do not or will not have the training or skills required to assist the engineer is blasted by the practice of the railroads in those States that permit it, and in neighboring Canada, to have some train crew brakemen so trained, and indeed, to be in the line of promotion to diesel engineers. Hence it is a false issue to argue that the engineer's assistant must have special training. The answer is a concession that he

1. Of course, a different issue would be involved with perhaps a different conclusion if, with the abolition of the rigidly constituted train crews under the repealed statutes (§§ 54-a and 54-c), train crews and engine crews were fungible. But the history of the statutes and the argument by the parties, as well as the thrust of the majority view, is that the engine crew of two is inviolate, that is, that the functions of that crew cannot be performed by members of the train crew, however otherwise qualified. Or put the other way around, the members of the engine crew cannot perform any of the functions normally performed by the train crew.

must, although not necessarily the full training of an engineer, but that such training may be obtained and required of one or more members of the train crew.

In the 1930's, and earlier, before many of the mechanical and technological advances of today, and before the full displacement of the steam locomotive by the diesel engine, both engines and trains required sufficiently large complements of men that it did not seem unreasonable to keep the complements separate. There was more than enough work, or so it appeared, for all the men in each complement. But with the state of the railroad art today, together with straitened ecomomic conditions in railroading, the evidence shows that the continued enforced separation of the men who perform the two kinds of functions in the operation of a train is unreasonable, if safety of operation is the only proper justification. The many automatic and semi-automatic fueling, switching, and coupling arrangements today do not justify specialized manpower for each of the historically equivalent manual operations of another day (see *Engineers* v. *Chicago, R. I. & P. R. R. Co., supra*).

On this view, there is no problem of undoing affirmed findings of fact conclusive on this court. Rather, there is involved the review of inferences that are not sustainable in reason, namely, that because engineers need assistants, those assistants must come from a segregated, inviolate engine crew, fully trained as engineers, and that a functionally merged engine-train crew is dangerous or logically impossible. On a parallel view, the argument does not suffice that, if there were a statutory or administrative substitute for the offending "rigid" statute, the equivalent would have to be stated in the form of some generalization or rule. The point is that a valid rule or statute would (and could) require no more than an assistant to the en-

gineer, and not that he be always a separate member of the engine crew isolated by training, function, and regular promotion from the train crew.

This conclusion is supported by the reports, set forth in Appendix A to the railroads' brief, of numerous commissions and boards which have examined and rejected the need for "firemen" in diesel locomotives, as an independent and separable job function, for safety reasons (see, e.g., Report of the Royal Commission on Employment of Firemen on Diesel Locomotives in Freight and Yard Service on the Canadian Pacific Railway [1957], esp. at p. 18; Report of the Presidential Railroad Commission [1962], esp. at pp. 40, 43, 45; Opinion of Neutral Members of National Mediation Board, Arbitration Board No. 282 [1963], esp. at 41 L A 687-688; Report of the National Joint Board Established Pursuant to the Award of Arbitration Board No. 282 [1966], esp. at pp. 64, 73, 75, 76, 89, 108).

The short of it is that no subtlety can conceal what is a matter of common knowledge and what comes through the record and argumentation in this case, namely, that the effect and, indeed, the sole purpose of the full crew law today is a maneuver in economic and political bargaining, and not a safety measure. To a certainty, a legislature may regulate economic matters in the public economic interest or in the interest of safety. What it may not do, because it would be in violation of constitutional limitations, is to regulate economic matters in the special interest of a special group. This is the difference between the power to regulate safety and to legislate "feather-bedding" in the interest of a special group. In the present context, the questioned statute is an unwarranted imposition on the railroads in the State, deprives them of due process and the equal protection of the laws, and is therefore unconstitutional.

Accordingly, I dissent and vote to reverse and grant judgment in favor of plaintiffs.

Chief Judge FULD and Judges BURKE and EAGER[2] concur with Judge BERGAN; Judge BREITEL dissents and votes to reverse in an opinion in which Judges SCILEPPI and JASEN concur.

Upon reargument: Order affirmed.

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2. Designated pursuant to section 2 of article VI of the State Constitution in place of KEATING, J., disqualified.

Related Opinion of the Public Service Commission

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on April 23, 1968.

COMMISSIONERS PRESENT:

JAMES A. LUNDY, *Chairman*
RALPH A. LEHR
FRANK J. MCMULLEN
EDWARD P. LARKIN
JOHN T. RYAN

CASE 24598—Complaint of the New York State Legislative and Education Board, Brotherhood of Locomotive Firemen and Enginemen, against Canadian National Railway Company as to alleged violations of Section 54-b of the Railroad Law.

* * *

This Commission having adopted an order in this proceeding on November 28, 1967 instituting an investigation into a complaint by the New York State Legislative and Education Board, Brotherhood of Locomotive Firemen and Enginemen as to alleged violations of Section 54-b of the Railroad Law by Canadian National Railway Company with respect to operations of international freight trains by said railway corporation into Niagara Falls, New York, without a fireman in the engine crew, and public hearing after due notice having been held, and the Commission having determined that the instructions of Canadian Na-

tional Railway Company should be clarified as hereinafter set forth and that the complaint should be dismissed, it is

ORDERED:

1. That Canadian National Railway Company be and it hereby is directed to clarify its instructions relative to operations of international freight trains into Niagara Falls, New York to the extent of specifying that, except in emergencies, the person, in addition to the engineer, assigned to the engine must remain in the cab at all times.

2. That the complaint filed herein on September 28, 1967, by the New York State Legislative and Education Board, Brotherhood of Locomotive Firemen and Enginemen be and it hereby is dismissed.

By the Commission,

(SIGNED) SAMUEL R. MADISON
Secretary

(SEAL)

SAT: d s

A-80

Related Opinion of the Public Service Commission

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

APPROVED BY THE COMMISSION APR 23 1968

CASE 24598—Complaint of the New York State Legislative and Education Board, Brotherhood of Locomotive Firemen and Enginemen, against Canadian National Railway as to alleged violations of Section 54-b of the Railroad Law.

APPEARANCES:

Kent H. Brown, Counsel (by Stuart A. Treby, Assistant Counsel), for the Public Service Commission.

McClung, Peters & Simon (by Homer E. Peters), 75 State Street, Albany, N. Y., attorneys for Brotherhood of Locomotive Firemen & Enginemen, complainant.

Moot, Sprague, Marcy, Landy & Fernbach (by Richard F. Griffin), 290 Main Street Building, Buffalo, N. Y., attorneys for Canadian National Railway.

Gerald E. Dwyer, General Attorney (by Thomas J. Smith, Assistant General Attorney), 466 Lexington Avenue, New York, N. Y., for the Pennsylvania-New York Central Transportation Company.

E. L. TITUS, Examiner:

By order adopted on November 28, 1967, the Commission directed that an investigation be instituted with respect to operations of international freight trains into Niagara Falls, N. Y. without a fireman in the engine crew. Public

hearing was held in Albany on February 7, 1968 at which testimony was presented on behalf of complainant by Mr. Ronald S. Mitchell, a locomotive engineer, and Mr. J. C. Wilson, a fireman-helper, and for the railroad company by Mr. Ross A. Walker, Operations Manager for the southwestern Ontario region.

The operations of Canadian National Railway (CNR) which are the subject of this proceeding consist of the transfer of freight cars from Niagara Falls, Ontario, across the Niagara River into the yards of Penn Central, Erie-Lackawanna and Lehigh Valley railroad companies in the State of New York. The movement of cars is in one direction only with the engine returning light to Canada. Mr. Mitchell testified that the operation is over tracks of CNR to the United States and then over tracks of Penn Central for a distance of about three miles. In serving the Lehigh Valley yard, the train moves through an interlocking to Lehigh Valley tracks on which it travels about three and one-half miles. In serving the Erie-Lackawanna yard, the train moves through an interlocking to Erie-Lackawanna tracks on which it travels five or six miles.

Mr. Mitchell said that the crew consists of four men, an engineer, two yard men, and a yard foreman who is in charge. He testified that he is familiar with the operations in New York State and that there is not at all times a second man in the engine cab. After the train is pulled into the Penn Central yard, the yard man gets off and cuts the engine from the train. He then rides the footboard to the switching lead where he contacts the yard operator by telephone and inquires as to the track on which to return. He then lines up the switches for the return movement. During this time he rides the side of the engine at the front. On some occasions cars are set off on two tracks during

which time the yard man is not in the cab. Four of the Penn Central yard tracks are on curves and two men are required on the ground to relay signals when making these "doubles." Operations in the Erie-Lackawanna yard were said to be similar to those in the Penn Central yard. During Lehigh Valley operations the entire crew is on the engine. The elapsed time without a second man in the cab was estimated as about five minutes and the distance traveled without such a man as about one-quarter to one-half mile.

According to the witness, the four-man operation went into effect about September 1, 1967. Prior thereto a fireman-helper remained in the cab at all times except in emergencies. His duties were to observe and to relay signals. The engines were described as 1200 horsepower diesel powered. The number of cars handled average from thirty to forty.

Questioned on cross-examination by counsel for CNR as to whether instructions had been issued by CNR that an employee should be assigned to the cab of the engine while in New York State, the witness answered "Yes." The instruction was received as Exhibit 3 and is reproduced as an appendix hereto. It should be noted that the instruction makes no reference to the cab of the engine. The witness agreed that it was his understanding that a man was to be assigned to the cab and that if the engineer were left alone it was in violation of instructions. The witness also said that there are windows on all four sides of the cab which provide an unobstructed view when traveling with the cab forward. He can also see over the top of the housing for the Diesel units if he stands up. On redirect he stated that one cannot make observations on the opposite side of the engine over the housing.

Related Opinion of the Public Service Commission

Mr. Wilson testified that he is the local chairman for the Niagara Falls Lodge of the Brotherhood and that he has been qualified as an engineer since 1953. He described the hiring procedure for firemen as consisting of a physical examination after which instruction in the rules is received, followed by three trial trips on the locomotive. Thereafter, following training in mechanical work and the writing of "year books," he qualifies as an engineer in yard and freight service. On cross-examination the witness said that the yard man also takes a physical examination and receives instructions on the same book of rules as the fireman. The yard man takes three trial trips on which he receives instructions about the switches and the handling of cars.

Mr. Walker testified that he is responsible for all operations including the operation of trains, and the maintenance of track and equipment. He described the transfer operation as previously covered herein and pointed out that no switching or making up of trains is performed in New York and that there are no crossings at grade over which the trains operate. There is no requirement in Ontario for a fireman or helper in yard service and it is the company's practice to operate without a fireman. He said that he was responsible for the decision to change the assignment for the New York operation. One of the members of the crew, the yard foreman or a yard man was instructed to place himself on the engine at the point and time that the engine crossed in to New York State and to remain on the engine to assist the engineer during the time that the engine remained in the State of New York. According to the witness, the yard man is to remain in the cab during the time that the engine is within the State. The engineer has jurisdiction over him in telling him what duties he should perform. The witness stated that he was not made aware prior

to the hearing that the yard man left the cab and that it was not his intention to operate without crew of one engineer and one fireman or helper.

The witness explained the use of the higher paid yard man rather than a fireman-helper as being based on the crew assignment in Canada. Adding a man from the fireman-helper classification would require a fifth man and the company has chosen to assign the duties formerly performed by the fireman to a qualified yard helper while in New York. He said that the physical standards and the examinations on the book of rules are identical for both fireman-helper and yard helper. The duties of fireman-helper, as described in Bulletin No. 18 (Exhibit 6) may be summarized as requiring compliance with the operating rules and instructions, assisting the engineman subject to his instructions and compliance with instructions governing the operation of steam generators. He testified that the helper assigned to the engine while operating in New York is fully qualified to perform the duties set forth in the company's bulletin.

On cross-examination, Mr. Walker said that after a man is employed as a fireman-helper he receives day-to-day training from the engineer. Classes relating to the mechanical operation of various types of equipment he would be associated with are made avaliable. He takes examinations on three occasions and if he fails he is released from service. The last fireman was hired by the company over ten years ago. The yard helpers are not given the mechanical training. Their next promotion step is to yard foreman or conductor. According to the witness, the total responsibility for the operation of the engine rests upon the engineman who can ask or direct the helper to assist him to whatever extent is necessary. Mr. Walker admitted that

Related Opinion of the Public Service Commission

Exhibit 3 (appended) does not contain the word "cab" but that he interprets "on the engine" as meaning in the cab. He concedes that the operation as described in which the helper leaves the cab is a violation of the intent of the directive.

On redirect examination, he stated that if there is any question as to the interpretation of the directive, he is willing to amend and clarify the notice so that it is clear that the helper must be in the cab of the engine.

Discussion and Recommendation

Transfers of cars from the CNR yard in Niagara Falls, Ontario, to the yards of Penn Central, Lehigh Valley and Erie-Lackawanna in Niagara Falls, N. Y. are made daily by crews of CNR. A round trip requires from one and one-half hours to three hours. Usually more than one trip is made per day. The crew consists of a yard foreman in charge of the operation, two yard helpers and an engineer. Upon entry into New York State a yard helper or the yard foreman is assigned to perform the duties of fireman-helper pursuant to instructions issued August 26, 1967 and received as Exhibit 3 (appended).

The evidence is conclusive that on some occasions the second man has left the engine to perform miscellaneous duties such as cutting off cars, lining up switches and relaying signals, which form the basis of the alleged violations of Section 54-b of the Railroad Law. Section 54-b follows:

> "Full crews for fuel-electric engines.—No person, corporation, trustee, receiver or other court officer shall run or operate, or cause to be run or operated, on any railroad within this state any fuel-electric engine, unless said engine shall be manned with a

> crew of not less than one engineer and one fireman or helper. Each separate violation of the provisions of this section shall be a misdemeanor punishable by a fine of not less than one hundred dollars nor more than five hundred dollars. Each day that any such engine shall run in violation of the provisions of this section shall be deemed to be a separate offense. The public service commission shall enforce the provisions of this section. (L 1936 c 777. Eff. May 28, 1936.)"

CNR alleges that it was its intent to provide a helper who is to assist the engineer and to perform the duties formerly performed by the fireman-helper. The operations manager for the company interprets the directive "to have a person, either himself (yard foreman) or a helper (yard helper) on the engine at all times" to mean in the cab at all times. CNR has offered to amend and clarify the notice so that it is clear that the man is to remain in the cab.

Much of the record is concerned with the relative qualifications of the fireman-helper and the yard helper. Both must pass a physical examination before being hired and pass the same examination on the company's operating rules. Each makes three trial runs, the fireman-helper receiving instruction as to his duties on the engine and the yard helper on the handling of cars. The fireman-helper receives training thereafter in preparation for qualification as an engineer.

The record is not clear as to the necessity for the second man to leave the cab. Although the crew consists of four men, the disposition or whereabouts of the two not assigned to the engine was not referred to except in testimony relating to the doubling operation on certain tracks when two

men are required on the ground. One of these men is the helper assigned to the engine which leaves the fourth unaccounted for. Except for the ambiguity in the instructions (Exhibit 3, appended), it might be said that the alleged violations derive from the acts of the engineer in directing or permitting the assigned yard helper to leave the cab.

It appears that the yard helper and the yard foreman are both qualified by training in the company's operating rules to perform the required duties of fireman-helper in the transfer operation under consideration. It is recommended, therefore, that the complaint be dismissed. The company should be directed, however, to clarify its instructions to the extent of specifying that, except in emergencies, the person assigned to the engine must remain in the cab at all times.

Counsel for CNR moved to dismiss the complaint on the ground that the Commission does not have jurisdiction. A similar matter relating to jurisdiction under Section 54-c of the Railroad Law was disposed of in Case 17801 and the current motion will not be discussed herein (New York, New Haven & Hartford Railroad Company.)

Reference was made by both parties to Cases 23238 and 23327. Case 23238 related to a similar complaint under Section 54-b and 54-c of the Railroad Law. The company was directed to provide a minimum crew as required by Section 54-c. The record therein was not sufficient to reach a definitive conclusion as to whether the crew included a qualified helper (New York Central Railroad Company). Case 23327 related to a complaint alleging violations of Section 54-b of the Railroad Law. The company was directed to cease and desist from further violation. Only one

man, the engineer, was assigned to the engine during the operations complained of (Erie-Lackawanna Railroad Company.)

April 5, 1968
FLT: slc

A-89

CANADIAN NATIONAL RAILWAYS

August 26, 1967

Our file 6005

Subject Essential Service

Yardmasters, Crew-Clerks, Fireman's and Yardman's Bulletin Books

As of 0001 hours August 28 present understanding to provide a fireman/helper on yard assignments making transfers to U. S. A. is revised.

Effective this time and date, not necessary to supply fireman/helper in such instances.

To comply with requirements of State of New York, yard foreman will arrange to have a person, either himself or a helper on the engine at all times. No deviation of this portion of instructions will be condoned.

Firemen-helpers presently assigned to yard positions will be permitted to exercise their seniority to other service, in accord with the collective agreement, as their seniority and status permits.

JOHN E. WELLS
Trainmaster, R. F.

cc: H. B. Giles
G. W. Ellison
C. Wilson

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IN THE

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Supreme Court of the United States

October Term, 1968

No. 914

THE NEW YORK CENTRAL RAILROAD COMPANY; ERIE-LACKAWANNA RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE LONG ISLAND RAIL ROAD COMPANY; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor; LEHIGH VALLEY RAILROAD COMPANY; BOSTON AND MAINE RAILROAD; THE DELAWARE AND HUDSON RAILROAD CORPORATION; THE BALTIMORE & OHIO RAILROAD COMPANY; and THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Appellants,

against

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York; and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; and LEONARD RUBENFELD, as District Attorney of Westchester County,

Respondents,

and

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN,

Intervenors-Appellees.

On Appeal from the Court of Appeals of the State of New York

INTERVENORS-APPELLEES' MOTION AND BRIEF FOR AFFIRMANCE OR DISMISSAL UNDER RULE 16

THOMAS A. SHAW, JR.
HAROLD C. HEISS
Attorneys for Intervenors-Appellees
1 Chase Manhattan Plaza
New York, New York 10005

Of Counsel:
BREED, ABBOTT & MORGAN
New York, New York

TABLE OF CONTENTS

	PAGE
MOTION TO AFFIRM OR DISMISS UNDER RULE 16	1
STATEMENT	2
THE FACTS	3
ARGUMENT	
POINT I—This Court's decision in *Brotherhood* v. *Chicago, R. I. & P. R. Co.* disposes of this appeal	10
CONCLUSION	13

CASE CITED

Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R. I. & P. R. Co., —— U. S. ——, 89 S. Ct. 323, 21 L. Ed. 2d 289 (November 18, 1968) 2, 3, 10

IN THE

Supreme Court of the United States

October Term, 1968

No. 914

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Intervenors-Appellees.

On Appeal from the Court of Appeals of the State of New York

INTERVENORS-APPELLEES' MOTION AND BRIEF FOR AFFIRMANCE OR DISMISSAL UNDER RULE 16

Intervenor-Appellees* move pursuant to Rule 16 of the Rules of this Court for affirmance on the ground that the

* As of January 1, 1969, the intervenors Brotherhood of Locomotive Firemen & Enginemen and Order of Railway Conductors & Brakemen merged with the Brotherhood of Railroad Trainmen and the Switchmen's Union of North America into the United Transportation Union.

question presented by the appellants on this appeal—the constitutionality of a state railroad full crew law—was correctly decided below and has been definitively decided only this Term by this Court in *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, R. I. & P. R. Co.*, —— U. S. ——, 89 S. Ct. 323, 21 L. Ed. 2d 289, (Nov. 18, 1968) and accordingly is so unsubstantial as not to need further argument; and alternatively to dismiss the appeal on the ground that it presents no substantial federal question.

Statement

The statute here in question is Section 54-b of the New York Railroad Law which prohibits operation of "* * * any fuel-electric [i.e., diesel] engine, unless said engine shall be manned with a crew of not less than one engineer and one fireman or helper."

The complaint, served in 1961, attacked the constitutionality of this statute and in addition former Sections 54-a and 54-c of the Railroad Law (since repealed) as violative of the Due Process, Equal Protection and Commerce Clauses on the ground that (68a,* Complaint, par. 20):

> "The effect of said laws upon such [plaintiffs' railroad] operations is to compel plaintiffs to employ unnecessary firemen, brakemen, trainmen and baggagemen without regard to operating conditions, safety, efficiency or other factors proper or relevant for consideration in connection therewith."

After a lengthy trial, the Trial Court (per Hon. Gerald Nolan), upon detailed findings of fact, rejected the rail-

* Page references to appellants' "Appendiix to Jurisdictional Statement" begin with the letter "A". Page references to the printed Record are followed by the letter "a", e.g., 68a.

roads' contentions and concluded that the requirements of the stautes were rationally based in the promotion of safety. (A-1 et seq.; 46 Misc. 2d 68, 259 N. Y. S. 2d 76, Sup. Ct., Westchester Co. 1965.)

The Appellate Division, Second Department, affirmed, specifically affirming the findings of fact (A-57; 28 A. D. 2d 735, 282 N. Y. S. 2d 68, 2d Dept. 1967).

The New York Court of Appeals, in turn, has also affirmed. (A-58 et seq.; 23 N. Y. 2d 1, 241 N. E. 2d 730, 1968.) It should be noted that the Court of Appeals decision was handed down on October 10, 1968, more than a month before this Court's decision in *Brotherhood* v. *Chicago, R. I. & P. R. Co., supra.*

The sole question presented by the appellants in their Jurisdictional Statement (p. 4) is whether Section 54-b, as interpreted by the New York Court of Appeals, is "* * * UNCONSTITUTIONAL CLASS LEGISLATION."

The appellants fail to state anywhere in their Jurisdictional Statement the constitutional provision claimed to be involved in the appeal.

The Facts

The New York Court of Appeals has authoritatively construed the Section 54-b manning requirement of a "fireman or helper" in addition to the engineer on diesel locomotives. It held in the affirmative on the issue "whether Section 54-b must be read as requiring the assignment of an additional engine crew member to help the engineer, and

that this is not sufficiently met by the assignment of a front-end brakeman from the train crew;" (A-61, 65).

Appellants contend that, as so interpreted, the statute is "unconstitutional class legislation" because, as they state (p. 6):

> "* * * the Court of Appeals held that a brakeman cannot serve as a 'helper' to the engineer."

The basic factual predicate upon which appellants' argument is founded is, to put it bluntly, a flat misstatement of the Record and findings, and is repeated at least five times in their Jurisdictional Statement:

> 1. "* * * the indisputable fact [is] that brakemen are as qualified as firemen to act as helpers on such [diesel] locomotives." (p. 5)
>
> 2. "The proven, indisputable fact—not challenged by the Court of Appeals—is that firemen are sent out on the road with no more training or experience than brakemen." (p. 6)
>
> 3. "The undisputed fact of record is that firemen are no more assistant engineers than brakemen are. They are sent out on the road with no more training or experience than brakemen." (p. 8)
>
> 4. "The Court of Appeals ignored the conceded fact that firemen are required to have no more qualifications than brakemen or other operating personnel; * * *." (p. 13)
>
> 5. "What they [the appellants] do say is that given the conceded facts that brakemen receive the same training as firemen, * * *." (p. 22)

Far from being "proven," "indisputable" or "conceded," the Trial Court's affirmed findings of fact are (A-24-25):

> "The fireman is taught and required to learn about the mechanical operation of the locomotive, and the engine, as well as to acquaint himself with the electrical circuits and other features of the diesel-electric power plant. He is taught how to discover, and to some extent to correct, malfunctions in the operation of the locomotives, and customarily relieves the engineer at times and operates the locomotive under his supervision.
>
> "No training is given to the other members of the train crew with respect to the operation of the locomotive or the discovery or correction of malfunctions in its operation."

The evidence establishes that this unique training of the fireman commences at the outset of his employment. Each of the plaintiffs provides its newly hired fireman with a series of manuals covering the operation and mechanics of the diesel engine. These firemen's manuals are all in evidence.*

The New York Central, for a typical example, provides each newly hired fireman with a 237-page book entitled "Examination for Firemen or Helpers—First, Second and Third Series" (Ex. AE, 4761a); and also, a book entitled "New York Central Instruction for Operation of Diesel Electric Locomotives, All Classes" (Ex. AF). Each fireman is then required to take a series of progressive examinations on diesel mechanics and operation which are given

* Exs. AE, AF, BT, CG, CH, CI, CJ, CX, CY, CZ, DN, DU, EB, EP, EQ, ER, ES, EU, EW, FA, FC, FD, FE, FO, FP, FQ.

successively on the first, second and third anniversaries of his entering service (Ex. AE, 4767a; see also 4789a, 4824a). If the fireman fails to pass either of the first two examinations, he is dismissed from the service; with respect to the third examination, according to a New York Central witness:

> "If he passes it, he is a qualified engineer. If he doesn't pass it, we relegate him, as Mr. Kenefick said, a round house engineer, a hostler" (608a).

The Court is respectfully referred to the tables of contents of some of these firemen's manuals, indicating their breadth, which are reproduced in the Record (4763-7a, 4786-91a, 4821-5a, 4826-7a).

Appellants quote (pp. 8-10) from the testimony of New York Central Vice President Kenefick in support of their claim that the training and qualifications of brakemen are the same as firemen. But Mr. Kenefick testified on cross-examination to precisely the opposite effect (325a-326a):

> "Q. Mr. Kenefick, it is a fact, is it not, that the brakemen or let's say those in train service do not take any training whatever in the operation or mechanical functions of a Diesel engine? A. That's right.
>
> "Q. It is solely the fireman who gets that training? A. I know it is not the trainman.
>
> "Q. You have already identified this examination book, so you know it is the fireman, don't you? A. Yes.
>
> "Q. How many runs does it take and how much instruction does it take before a fireman can start operating a train? A. Before he starts to operate the train?
>
> "Q. Under the supervision of the engineer? A. I couldn't say. I think it would vary.
>
> "Q. You don't know anything about that? A. I said it would vary, widely.

"Q. Isn't it a fact that he begins to operate [390] in the yard service after his student runs; he begins under the supervision of the engineer to operate the engine? A. He does, yes."

The difference in training and qualifications between firemen and brakemen stems from the craft distinction which has always been recognized in railroading between the "engine crew" which consists of the engineer and the fireman, and the "train crew" which consists of the conductor, brakemen and baggagemen. The firemen are universally on the engineers seniority list and, accordingly, are trained and eventually qualify to act as engineers. On the other hand brakemen are trained in the functions of the train crew and eventually become conductors (263-4a).

As the Erie-Lackawanna's fireman's manual states (Ex. BT, 4788a):

"In order that an Engineer or Fireman may perform his duties successfully, he must have a thorough knowledge of the locomotive, both the operation and how to successfully meet the unexpected and adverse conditions when they arise.

"Engineers and Firemen will be required to familiarize themselves with all locomotives and locomotive devices in use on their divisions."

As a result of his training and qualifications, the fireman is able to perform duties which the brakeman is not trained and qualified to perform with respect to the relief of the engineer and the mechanics of the diesel engine. The Trial Court found:

As to the Fireman's Mechanical Functions

> "When conditions permit, the fireman, or helper, answers alarms from other units of the engine consist, and makes inspections to discover malfunctions for which there are no alarms." (A-25)

As to the Fireman's Relief Functions

> "It is also established * * * that the engineer's tour of duty often requires many hours of work, in snow, sleet or rain, and other adverse weather conditions, and the argument that temporary relief of the engineer by the fireman contributes to safety under such conditions is at least worthy of serious consideration. * * *
>
> "Moreover, in all types of service, he [the fireman] is the only employee in the cab who may be expected to be capable of relieving the engineer in case of fatigue or emergency." (A-26-27)

The railroads have never contended that they want to replace the fireman with an additional brakeman assigned solely to the engine crew, since this would not result in any saving to them. Rather, as the Court of Appeals noted (A-60), they want the head-end brakeman, in addition to his duties as such, to serve as the assistant to the engineer, which they concede the engineer must have. They state in their Jurisdictional Statement (pp. 6-7):

> "The Railroads do not now and never have claimed they intend to operate any diesel powered train, freight or passenger, without two men in the cab of the locomotive. It is the invariable practice and rule on the Railroads that the head brakeman ride in the cab of the locomotive on freight trains (32a; 509a; 4624a; 4629a; 4758a; 4785a). As the New York Court of Appeals

stated 'they [the Railroads] concede that in passenger trains where the front-end brakeman does not ride in the engine cab, there must be a helper specially assigned for the engineer and that in this effect on passenger train operation the statute is valid' (A-60)."

But in addition to his lack of training and qualification to assist the engineer in the operation and mechanics of the diesel, the head brakeman is, by reason of his duties as such, frequently outside the engine cab. The Trial Court so found (A-27):

> "The evidence establishes, and I find that in road freight service, particularly in switching operations, the head brakeman on frequent occasions is not in the cab of the locomotive, and the fireman is the only crew member in position to take and pass signals and to act as lookout on the left hand side. * * *
>
> "The evidence does not establish, nor do I find that the lookout and signal passing duties of the firemen in road freight service are unsubstantial or that they can be dispensed with without some sacrifice of safety."

The Court of Appeals, after referring to these factual findings, sustained the Trial Court's conclusion as follows (A-70, 23 N.Y. 2d at pp. 14-15):

> "The conclusion from all this was: 'Although there is room for argument, and the question may be fairly debatable, I do not find that it is unreasonable to require, as the full crew statutes do, that a second man be present in the locomotive cab, or that the second man shall have, in addition to ability to act as lookout and read and pass signals, the training and qualifications ordinarily possessed by firemen, which may make it

possible for him to be of assistance to the engineer in the operation of the locomotive.' (46 Misc.2d, pp. 87-88)

* * *

"The evidence is of sufficient legal effect to permit the Special Term to reach, and the Appellate Division to affirm the essential factual conclusion on which the decision for defendants is based."

ARGUMENT

POINT I

This Court's decision in *Brotherhood* v. *Chicago, R. I. & P. R. Co.* disposes of this appeal.

Precisely the same arguments presented on this appeal were before this Court just a few months ago in the Arkansas full crew law case. These arguments were summarized by the Court in its opinion as follows (21 L. Ed. 2d at p. 295):

"Although the railroads recognize that the fireman performs a valuable lookout function on passenger trains, where he and the engineer are the only crewmen in the engine cab, they assert that in both freight hauling operations and yard switching operations other railroad employees are available to provide an adequate lookout and assist the engineer in correcting mechanical problems and performing other miscellaneous duties. The railroads thus maintain that the firemen, and some of the other required crewmen, perform no useful function and make no significant contribution to safety. * * *

"The State of Arkansas and the railroad brotherhoods, all appellants here, take a different view of the

functions preformed by the firemen and other additional crewmen required under the statutes. They claim that the work performed by these employees—serving as lookout, passing signals, relieving the engineer in emergencies, inspecting the engine and other cars, and helping to make needed adjustments and repairs while the train is moving—is still necessary and cannot be performed by other employees without unduly burdening them and interfering with the proper performance of their other tasks."

Despite the findings of fact by the Arkansas 3-judge District Court, which fully supported the railroads' factual contentions, this Court sustained the constitutionality of the Arkansas laws. After noting (21 L. Ed. 2d at p. 296) that "* * * the statistics showed that railroad accidents had actually increased during the period from 1964-66, when the size of train crews was being reduced.", the Court summarized the findings of Arbitration Board 282,* particularly on the fireman issue, and then stated (21 L. Ed. 2d at p. 297):

"This summary, taken from evidence heavily relied upon by the railroads and generally favorable to their position, leaves little room for doubt that the question of safety in the circumstances of this case is essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives. The District Court's responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support

* These findings have been heavily relied on and quoted in the courts below by the appellants, as they were by the railroads in the Arkansas case.

it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was 'pure speculation.' "

This conclusion applies *a fortiori* to the present case, in which the affirmed findings of fact below are not only directly contrary to the railroads' contentions, but amply support the New York Legislature's judgment to retain the engine crew requirements of Section 54-b when in 1966 it repealed the train crew requirements of former Sections 54-a and -c.

In the final paragraph of its decision, in language dispositive of this appeal, this Court made it clear that state full crew laws will not be invalidated by the courts (21 L. Ed. at p. 300):

"Under all the circumstances we see no reason to depart from this Court's previous decisions holding that the Arkansas full-crew laws do not unduly burden interstate commerce or otherwise violate the Constitution. Undoubtedly heated disputes will continue as to the extent to which these laws contribute to safety and other public interests, and the extent to which such contributions are justified by the cost of the additional manpower. These disputes will continue to be worked out in the legislatures and in various forms of collective bargaining between management and the unions. As we have said many times, Congress unquestionably has power under the Commerce Clause to regulate the number of employees who shall be used to man trains used in interstate commerce. In the absence of congressional action, however, we cannot invoke the judicial power to invalidate this judgment of the people of Arkansas and their elected representatives as to the price society should pay to promote safety in the railroad industry."

Conclusion

The intervenors-appellees' motion for summary affirmance or dismissal should be granted, with costs.

Respectfully submitted,

THOMAS A. SHAW, JR.
HAROLD C. HEISS
Attorneys for Intervenors-Appellees
1 Chase Manhattan Plaza
New York, New York 10005

Of Counsel:
BREED, ABBOTT & MORGAN
New York, New York

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October Term, 1968

No. 914

THE NEW YORK CENTRAL RAILROAD COMPANY; ERIE-LACKAWANNA RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE LONG ISLAND RAILROAD COMPANY; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor; LEHIGH VALLEY RAILROAD COMPANY; BOSTON AND MAINE RAILROAD; THE DELAWARE AND HUDSON RAILROAD CORPORATION; THE BALTIMORE & OHIO RAILROAD COMPANY; and THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Appellants,

against

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York; and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; and LEONARD RUBENFELD, as District Attorney of Westchester County,

Respondents,

and

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN,

Intervenors-Respondents.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION ON BEHALF OF RESPONDENT LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, TO DISMISS OR AFFIRM

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Respondent

RUTH KESSLER TOCH
Solicitor General

JOSEPH A. ROMANO
Assistant Attorney General

of Counsel

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

	PAGE
Statement of the Case	2
Argument	3
The appeal does not raise a substantial federal question	3
Conclusion	12

CASES CITED.

BLF & E v. *Chicago, R. I. & P. R. Co.*, ___ U. S. ___, 89 S. Ct. 323, 37 U. S. L. W. 4032 (November 18, 1968) 3, 9

New York Public Service Commission Case No. 23327 (1965) 10

Standard Oil Co. v. New Jersey, 341 U. S. 428, 423 9

CASES DISTINGUISHED.

Atchison, Topeka & Santa Fe Ry. Co. v. *State*, 33 Ariz. 440, 265 Pac. 602 (1928) 10

Missouri-Kansas-Texas Railroad Co. v. *State*, 131 S. W. 2d 702 (Tex. Civ. App. 1939), writ of error refused (Tex. Sup. Ct. 1939) 10

New York Public Service Commission Case No. 24598 (1968) 10

Smith v. *Texas*, 233 U. S. 630 9

IN THE

Supreme Court of the United States

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Louis J. Lefkowitz, Attorney General of the State of New York, a respondent in the above entitled matter, moves to dismiss the appeal herein on the ground that the appeal presents no substantial federal question and, in the alternative, moves to affirm the order appealed from on the ground that the question raised in the appeal was correctly decided by the Court below and is so unsubstantial as not to need further argument.

Statement

The action was brought by the *ten* major railroads operating in New York seeking a judgment declaring invalid on constitutional grounds the New York full crew laws then in effect (*Railroad Law*, § § 54-a, 54-b and 54-c) and enjoining their enforcement. In the trial at Special Term there was a comprehensive factual examination into the reasonableness of the effect of the full crew laws on the operation of plaintiffs' railroads under modern technological conditions and operational procedures. The Trial Court in a scholarly opinion (A-1—A-55)* directed the complaint be dismissed; judgment was entered accordingly.

Pending plaintiffs' appeal to the Appellate Division, the Legislature, in 1966 repealed sections 54-a and 54-c of the New York Railroad Law; this was approved by the Governor. The Legislature refused to repeal section 54-b notwithstanding the suggestion of the Public Service Commission in 1960 on proof similar to that adduced by the appellants at the trial of this action (3787a) to repeal the New York full crew statutes in their entirety (A-7—A-9; A-59). The Appellate Division concerned only with the validity of section 54-b affirmed the findings of the Special Term but, modifying on a procedural point, explicitly declared section 54-b constitutional, otherwise affirmed on the opinion at Special Term (A-56; A-59).

The New York Court of Appeals affirmed the findings and determinations of the lower courts (A-58—A-77).

Section 54-b, enacted in 1936, provides that every diesel engine ("fuel-electric engine") must be "manned with a

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* Page references to Appellants' Appendix to Jurisdictional Statement. Page references to the printed Record are followed by letter "a."

crew'' of not less than ''one engineer and one fireman or helper.''

Appellants admit to be valid the general thrust of the statute mandating the presence of two men in the cab of the diesel engine. They acknowledge that the engineer should not be alone in the cab and concede that there ought to be an additional man there as a helper. However, they take issue with the interpretation ''that the second man shall have, in addition to ability to act as lookout and read and pass signals, the training and qualifications ordinarily possessed by firemen, which make it possible for him to be of assistance to the engineer in the operation of the locomotive'' (A-70), and they charge that section 54-b as interpreted by the New York Court of Appeals is unconstitutional class legislation.

ARGUMENT

The appeal does not raise a substantial federal question.

The question presently before this Court was decided in the recent Arkansas decision approximately three months ago. This Court should not be subjected to hear a similar argument.

Railroading is a hazardous occupation. Safety measures (full crew statutes) affecting railroad operations have again been sustained by this Court as a proper exercise of the police power of the States (*B. L. F. & E.* v. *Chicago, R. I. & P. R. R. Co.*, ____ U. S. ____, 89 S. Ct. 323, 37 U. S. L. W. 4032 [Nov. 18, 1968]).

The railroads summarize their argument at pages 6 and 7 of their Jurisdictional Statement:

"While so-called full crew laws have been before this Court many times, this case presents for the first time the question of whether a state can in the exercise of its police power constitutionally require a fireman to the exclusion of all other operating personnel as a 'helper' to an engineer on a diesel locomotive. The New York Court of Appeals held that it could."

* * *

"This case does not concern itself with the issues posed by the full crew cases—whether it is constitutional to require a certain minimum number of men in a railroad crew."

* * *

And appellants underpin their position:

"Both the majority and dissenting opinions of the [New York] Court of Appeals were in agreement on the issue before that court and now posed in this Court. The dissenting opinion stated the issue as follows (A-74):

"'The evidence amply supports, and the railroads do not contend otherwise, that the presence of an assistant to the engineer however termed or titled, in the engine cab is justified at all times.* * * That is not the issue. The issue is whether safety requires that such an assistant be assigned to the engine crew, separate from the train crew. The argument that brakemen on the train crew do not or will not have the training or skills required to assist the engineer is blasted by the practice of the railroads in those states that permit it, and in neighboring Canada, to have some train brakemen so trained, and indeed, to be in the line of promotion to diesel engineers. Hence it is a false issue to argue that the engineer's assistant must have special training.'"

There should be added the balance of the paragraph of the dissenting opinion (A-74-75):

"The answer is a concession that he must, although not necessarily the full training of an engineer, but

that such training may be obtained and required of ~~one~~ or more members of the train crew."

The question at hand pervaded the recent Arkansas full crew case and in their reply brief in the New York Court of Appeals in the instant case—prior to this Court's decision in the Arkansas case—the railroads argued (p. 13):

> "One of the requirements of the Arkansas minimum crew law, however, was a 'fireman' on all freight and yard locomotives, and the issue in the *Hardin* case with respect to this 'fireman' requirement is the same as it is here. In *Hardin* the BLF & E argued, just as it did here prior to repeal of §§ 54-a and 54-c requiring a five man minimum crew in all freight and yard operations, that the requirement of a 'fireman' as a member of a six man minimum crew meant that a member of the BLF & E had to be retained irrespective of how many other crew members were available to help the engineer."

This Court in the Arkansas case reviewed some factual findings of Arbitration Board No. 282 demonstrating the technical proficiency of firemen necessary to insure safe and adequate transportation, and concluded that "the question of safety . . . is essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives."

The training and qualifications of the fireman are summarized in the opinion of the trial court (A-23-28) in the instant case The fireman possesses not only the ability to take and pass signals and act as a lookout—a talent common to all train employees—but also the training and qualifications, in all types of service, capable of the production and maintenance of power and relief to the engineer in case of his fatigue or in case of emergency. Trainmen (conductors and brakemen) do not possess these latter

attributes. The railroads' chief witness, a New York Central vice-president for transportation admitted (325-26a):

> "Q. Mr. Kenefick, it is a fact, is it not, that the brakemen or let us say those in train service do not take any training whatever in the operation or mechanical functions of a Diesel engine? A. That's right.
> "Q. It is solely the fireman who gets that training? A. I know it is not the trainman."

The trial court so found.

Additionally, the fireman is on the engineers' promotion list; he is trained and must qualify to act as an engineer within a specified period after being hired, and eventually he becomes an engineer. On the other hand, brakemen are trained in the functions of the train crew and eventually become conductors (263-4a).

This distinction has always been recognized by the railroads. Quite apart from the New York law and the full crew statutes of other states, the fireman has always been designated as the second man in the Diesel cab (A-9).

In this light upon the mass of evidence presented, the New York Court of Appeals was called upon to construe what the Legislature intended in 1936 by the expression "and one fireman or helper" as used in § 54-b. Its interpretation is challenged as unconstitutional class legislation. The railroads claim that they are under an unconstitutional compulsion by reason of the decision to provide employment to the members of a labor union solely on the basis of their being labelled "fireman." In essence, the railroads are saying that the Brotherhood of Locomotive Firemen and Enginemen is permitted "to run the show" with judicial approval.

Neither the New York Court of Appeals nor the lower courts of the State made any such determination. Con-

fronted with the problem of the construction of the phrase "and one fireman or helper" they correctly reasoned on the evidence that the individual, however termed or titled, must in the interest of safety, possess not only the ability to take and pass signals and to act as a lookout, but the supplementary training and qualifications in all types of service capable of the production and maintenance of power and relief to the engineer in case of emergency or the engineer's fatigue, and that such an individual must be assigned to the engine crew at all times as the statute directs. That is all the New York courts have said; no more; no less.

Distilled to its very essence the issue presented to the New York courts, and now before this Court, is simply stated: Who shall be of assistance to the engineer (a) the inexperienced and untrained employee or (b) or the man qualified and trained in the mechanical functions and operation of the diesel locomotive? In the interest of safety, common sense dictates the choice of the experienced man. Courts are at liberty to construe statutes in such a way as to make them conform to reason, justice and common sense. A statute is intended not only for the period in which it is adopted, but for the future also, and it should, in such cases, be interpreted according to the view which reasonable men would take of it in the light of existing circumstances. And that is exactly the manner in which the New York Court of Appeals resolved the question. Any other construction would produce an absurdity which the courts avoid whenever a more rational interpretation consonant with the primary purpose of a statute may be supported.

At pages 12 and 13 of their Jurisdictional Statement the railroads lament their management problems. Unfortunately for them that difficulty is not the subject of this

litigation. It may be resolved by other means. And much is said by the railroads about the New York courts expunging the word "helper" from section 54-b. Appellants have misconstrued the decisions. All that the courts have insisted on in the interests of safety is training and competence. For more than 30 years the railroads have been free to train and qualify capable assistants to the engineer, and during that entire period they have only qualified the "fireman". Their failure does not justify the slurs on the Legislature or the Judiciary (on page 17 of their Statement):

> "The lower courts seized upon the success of the BLF & E on some of the Railroads in requiring that firemen be trained as engineers and eventually qualify as such, and in some vague, unexplained way intimated that these requirements justify excision of the term 'helper' from the statute. These requirements, however, are nowhere embodied in the statute, and the necessary consequence of the lower courts' construction has been to delegate to the BLF & E the power to determine in its sole and nonreviewable discretion the standards and qualifications for 'helpers.'
>
> "The lower courts also held by necessary implication that the qualifications for 'helpers' can constitutionally vary from railroad to railroad because, as revealed above, the qualifications do in fact vary depending upon the bargaining strength of the particular local BLF & E lodge involved. But the Legislature cannot delegate its power to the BLF & E and it was error for the Court of Appeals to confer upon the BLF & E the exclusive franchise to determine who shall and who shall not be the second man on the locomotive."

We have searched the record in vain for the slightest justification for this.

The instant action was obviously not brought to settle discord between management and labor. Rather, by plead-

ing and proofs, the railroads challenged a safety statute —a matter of deep concern to the people of the State of New York (*BLF & E* v. *Chicago, R. I. & P. Co., supra*). The claim of abdication and delegation of legislative authority with judicial sanction is frivolous since it is fundamental that a delegation of a legislature's authority will never be implied. Courts, therefore, will not unnecessarily hold that the Legislature intended to delegate powers in the absence clear, definite language, unambiguously conferring such jurisdiction; and bad faith may not be imputed to the lawmakers.

In the interest of safety, the need for the second man in the locomotive cab to have the training and qualifications of the "fireman" type employee was fully recognized by this Court in *BLF & E* v. *Chicago, R. I. & P. R. Co., supra.* It follows rationally that any alternate or substitute for that position must of necessity possess the equivalent characteristics, qualities and fitness, no more, no less. Neither this Court nor the New York courts have suggested or insisted that the second man in the cab be an engineer or be specifically chosen to be trained as an engineer. Thus, no substantial federal issue is presented.

The construction of section 54-b—the New York statute —by the New York Court of Appeals is binding on this Court (*Standard Oil Co.* v. *New Jersey,* 341 U. S. 428, 423).

Appellants' reliance on cases which they cite is misplaced. The cases are distinguishable out of hand:

Smith v. *Texas,* 233 U. S. 630:

There, the statute required all conductors on freight trains to have two years experience as brakemen.

Here, the statute contains no such requisite. Section 54-b offers an open invitation to train any men as "helper" to capably and competently assist the engineer.

Atchison, Topeka & Santa Fe Ry. Co. v. *State,* 33 Ariz. 440, 265 Pac. 602 (1928):

There, the statute required anyone who received or transmitted train orders by telephone, including train crew members, to have at least one year's experience as a telegraph operator. It does seem ridiculous to require training in the Morse code when one is carrying on an oral conversation.

Here, the statute makes no similar comparable demand. We repeat, the section leaves the field wide open.

Missouri-Kansas-Texas Railroad Co. v. *State,* 131 S. W. 2d 702 (Tex. Civ. App. 1939), writ of error refused (Tex. Sup. Ct. 1939):

This case involved the duties of brakemen as such and was not concerned with the operation and functions of the locomotive. Therefore it is not pertinent.

New York Public Service Commission Case No. 24598 (1968):

The construction of a statute is for the Courts, whose jurisdiction cannot be ousted by administrative or executive authority. The decision by the New York Public Service Commission is thus not controlling. And perhaps the Commission's decision in *BLF & E* v. *Erie Lackawanna R. Co.,* Case No. 23327 (1965) was more convincing to the New York Court of Appeals on the legislative intent. In that case the Commission stated:

"It is well understood that, in the absence of anything to indicate a contrary legislative intent, technical or special words in a statute are to receive technical or special meanings. See 1 McKinney Laws § 233; *People* v. *Wainwright*, 237 N. Y. 407, 412; *People* v. *Lane*, 132 App. Div. 406, 407-408, affirmed 196 N. Y. 520. There can be little doubt that the word 'fireman' in this statute is not being used in the well known popular or ordinary sense of a man engaged in fighting fires. It is perfectly clear from the context of the statute that the technical or special meaning common in the railroad industry is intended. In like fashion, the word 'helper' in this statute is not being used in a popular or ordinary sense but, rather, is intended to carry technical or special meaning common in the railroad industry. The evidence in this record establishes that prior to, at the time of, and since the passage of this statute, the word 'helper' in the railroad industry has had meanings depending on the context of its use. When associated with a ground crew, 'helper' has meant a brakeman or similar type of employee; in connection with an engine crew, it has meant a man who replaces the fireman on an other-than steam locomotive. . . ."

The question presently before this Court was decided in the recent Arkansas decision approximately three months ago. This Court should not be subjected to hear a similar argument.

Conclusion

The appeal herein should be dismissed for lack of a substantial federal question, or in the alternative, the order appealed from should be affirmed, on the ground that the questions raised in the appeal were correctly decided by the Court below and are so unsubstantial as not to need further argument.

Dated: January 27, 1969.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Respondent

RUTH KESSLER TOCH
Solicitor General

JOSEPH A. ROMANO
Assistant Attorney General

of Counsel

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

NEW YORK CENTRAL RAILROAD COMPANY ET AL. *v.* LEFKOWITZ, ATTORNEY GENERAL, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 914. Decided February 24, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.